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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NATIONAL WOOD PRESERVERS, INC., *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

and

CLIFFORD ROGERS and VIRGINIA ROGERS

Appellees

and

TOWNSHIP OF HAVERFORD, *Intervenor*

ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT OF APPELLANT NATIONAL WOOD PRESERVERS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Is there an unduly oppressive exercise of the State's "police power" in violation of the due process clause of the 14th Amendment to the United States Constitution, where a State statute enacted into law subsequent to the time a land occupier goes into possession of property, imposes liability upon him based solely on his status as a land occupier, to eradicate, at unlimited cost, a polluting condition partially under the property occupied by him, created by the unlawful acts of a third person, prior to his occupancy, which he has not contributed to and which has no reasonable nexus to his use of the property.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania, dated April 24, 1980, affirming the Orders of the Commonwealth Court of Pennsylvania, is reported at — Pa. — , 414 A.2d 37 (1980) and is found in the Appendix at A-1. The opinion of the Commonwealth Court of Pennsylvania, dated May 24, 1978, affirming in part and reversing in part the Adjudication and Order of the Environmental Hearing Board, is reported at 35 Pa. Commonwealth Ct. 443, 387 A.2d 142 (1978) and is found in the Appendix at A-25. The Adjudication and Order of the Environmental Hearing Board, dated July 30, 1976, is unreported and is found in the Appendix at A-48. A pre-hearing Opinion of the Environmental Hearing Board denying a Petition to Join Samuel Jacoby as an Additional Defendant, *In Re National Wood Preservers, Inc.*, 64 D&C2d 78 (1974) and is found in the Appendix at A-91.

JURISDICTION

The Pennsylvania Clean Streams Law was enacted in 1937 (Act of June 22, 1937 P.L. 1987). Section 316 became a part of that law in 1965. As originally written, this section gave the State power to order a landowner or occupier to grant access to the land to permit the Commonwealth or an appropriate agency of the Commonwealth to eliminate a polluting condition.

Section 316 was amended on July 30, 1970. The 1970 Amendment which is the current language of the statute, drastically altered the scope of this section of the law so as to place responsibility for eliminating a polluting condition on landowners and occupiers. It now provides in part as follows:

> "§691.316 Responsibilities of Landowners and Land Occupiers
>
> Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the Board may order the landowner or occupier to correct the condition in a manner satisfactory to the Board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any persons holding title to or having a proprietary interest in either surface of subsurface rights." (Act of June 22, 1937, P.L. 1987 Article III, §316 *as amended July 31, 1970*, P.L. 653, 35 P.S. §691.316) (full text at A-113)

On July 12, 1973, Appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER") issued identical Enforcement Orders to Appellant, National Wood Preservers, Inc. (hereinafter "Wood"), Shell Oil Company (hereinafter "Shell") and Philadelphia Chewing Gum Corporation

(hereinafter "Gum").[1] *The persons and entities to whom these orders were issued all had the status of being landowners or occupiers of property located in the area of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania.*

These Orders stated that a contaminant consisting of creosote containing pentachlorophenol was causing a serious problem to the ground and surface waters of the Commonwealth known locally as "Naylor's Run" in the area of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania (R 25 - 30).[2] By these Orders, Appellant Wood and other entities and persons to whom they were issued, were directed to expend the funds needed to conduct tests, define the specific area of the contamination, develop engineering plans to remove same and to then, in fact, remove the contaminant from the ground and surface waters ". . . to such a degree as to restore the waters to their natural quality". (See Orders of DER dated July 12, 1973, found in the Appendix at A-101)

From these Orders, Wood and all other entities and persons to whom they were issued filed timely Appeals to the Pennsylvania Environmental Hearing Board (hereinafter "Board") which ordered all such Appeals consolidated.

By Adjudication and Order dated July 30, 1976, the Board sustained in part and dismissed in part the various Appeals. (See Adjudication of Environmental Hearing Board dated July 30, 1976, Appendix at A-48)

From this Adjudication and Order, Wood and all other entities and persons to whom the original Enforce-

1. On September 21, 1973, a similar Order was issued to Clifford A. and Virginia Rogers (hereinafter "Rogers"). (R 31, 32, A-107)

2. These and subsequent page references referred to hereinafter in this Jurisdictional Statement, which are preceeded with the letter "R", are found in the three (3) volume Reproduced Record in this matter. Those which are preceeded by the letter "A", are found in the Appendix submitted herewith.

ment Orders had been issued, filed timely Appeals to the Commonwealth Court of Pennsylvania. Once again, the various Appeals were ordered consolidated by the Court for the purpose of the proceedings before it.

On May 24, 1978, the Commonwealth Court issued its Opinion and Order sustaining the Appeals of Gum and Shell and dismissing the Appeals of Wood and Rogers. (Appendix at A-25)

On June 16, 1978, Wood filed with the Supreme Court of Pennsylvania, a Petition for Review of the Opinion and Order of the Commonwealth Court. Petitions for Review were also filed with the Pennsylvania Supreme Court by Rogers and by the DER with respect to that portion of the Commonwealth Court's Opinion and Order which dismissed Shell and Gum from the proceedings.

On February 16, 1979, the Supreme Court of Pennsylvania granted these Petitions for Review and ordered the matters consolidated for argument on appeal.

On April 24, 1980, the Supreme Court of Pennsylvania issued its Opinion and Final Judgment in this case, affirming the Orders of the Commonwealth Court as to Wood and Rogers and dismissing the Appeal of the DER because not filed timely.

At all stages of the proceedings, Appellant Wood argued that the 1970 Amendment to §316 of the Pennsylvania Clean Streams Law, Act of July 31, 1970, P.L. No. 222, 35 Pa. Stat. Anno. §691.316, created an unconstitutional burden upon Appellant in violation of the due process clause of the 14th Amendment to the United States Constitution.

Notice of Appeal to this Court was filed with the Prothonotary of the Supreme Court of Pennsylvania on July 3, 1980, and is found in the Appendix at A-101.

This Court has jurisdiction over this Appeal pursuant to 28 U.S.C. §1257(2).

This Appeal lies because the highest Court of the Commonwealth of Pennsylvania has sustained the pro-

visions of §316 of the Pennsylvania Clean Streams Law against a challenge that it is unconstitutional on its face and as applied to Appellant Wood. (See, *Cohen vs. California*, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780 (1971).

In upholding the validity of this statute, the Pennsylvania Supreme Court refused to rule on an independent state ground for reversing or affirming the decision of the Court below and has instead based its decision squarely upon the constitutional question presented to it by Appellant. Since the State court, after entertaining this constitutional question, has decided it adversely to the claim of unconstitutionality asserted by Appellant, this Court has jurisdiction to hear an appeal of this case. 28 U.S.C. 1257(2); *Hancock National Bank vs. Farnum*,176 U.S. 640, 20 S.Ct. 506, 44 L.Ed 619 (1900); *Henderson Bridge Co. vs. City of Henderson, Ky.*, 173 U.S. 592, 19 S.Ct. 553, 43 L.Ed. 823 (1899).

STATEMENT OF THE CASE

Trial on the merits of these consolidated matters commenced on November 20, 1974, before Board-Appointed Hearing Examiner, Louis A. Salamon, Esquire, and encompassed thirteen (13) days of testimony.

At the outset of the trial, *all parties, including Appellee DER entered into a Stipulation providing that the sole basis for the issuance of the Enforcement Orders by DER against the persons or entities to whom they were issued, was based upon the language contained in §316 of the Clean Streams Law.* (35 Pa. Stat. Anno. §691.316, See R 187(a) and Adjudication of Environmental Hearing Board dated July 30, 1976, at A-52).

The testimony and exhibits introduced at the Hearing before the Examiner established the following facts, substantially, all of which are contained in the Board's Adjudication and were affirmed by the Commonwealth Court and Supreme Court of Pennsylvania.

The Land, Waters, Parties and Polluting Condition

For over thirty four (34) years Rogers owned a piece of land located at Eagle and Lawrence Roads in Haverford Township, Delaware County, Pennsylvania. (See Adjudication of Environmental Hearing Board dated July 30, 1976, Finding of Fact #1, A-52) On January 10, 1947, Rogers leased this property to Samuel T. Jacoby and C. David Jacobs. They, in turn, assigned the lease to National Wood Preservers, Inc., a corporation which had been incorporated by Jacoby on January 24, 1947, and all of the stock of which was owned and controlled by him. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #2, Footnote 3, A-51, 52; and Stipulation Between Counsel for all Parties, R 136a, 137a)

Thereafter, for a period of sixteen (16) years from March 28, 1947 until July 30, 1963, Jacoby, through this corporate entity which he owned and controlled, operated a wood preservation business at the above-referred to leased location. (See Adjudication of Environmental Hearing Board dated July 30, 1976, Finding of Fact #3, A-53) During this period of time, *Jacoby, while conducting this business, used a chemical substance known as pentachlorophenol to treat and preserve wood, which he disposed of by pumping it into a thirty (30') foot deep well located on the leased premises.* (See Adjudication of Environmental Hearing Board dated July 30, 1976, Finding of Fact #4, A-53)

During the course of Jacoby's tenure as owner of this business, from at least 1953 until the Goldstein family purchased it from Jacoby on July 30, 1963, neighbors in the area surrounding the physical location of Jacoby's business, complained of the pollution of Naylor's Run Creek, complaining about an oily brownish liquid floating on the surface of the creek. (R 862, 863) As a result of these complaints, Haverford Township officials and the State Sanitary Water Board personnel investigated Jacoby's operation. (R 862-873) *In the summer of 1956,*

Jacoby discontinued the use of the well into which he had pumped the pentachlorophenol. (R 883)

By agreement dated July 30, 1963, *(exactly seven years before §316 in its present form was enacted)*, the Goldstein family, through a Pennsylvania corporation, NWP, Inc. purchased from Jacoby, all of his outstanding stock in Wood. (Exhibit E-12, R 70 - 85, 189; Stipulation Between Counsel for all Parties, 136, 137)[3]

Approximately one (1) month prior to purchasing the business from Jacoby, on July 30, 1963, Harris Goldstein came upon the premises and remained there continuously for that month in order to determine if he and his son would buy the business. (R 962, 963) While he was there, he observed the *generally dirty nature* of the operation. He inquired of Jacoby as to whether he had any pollution problem. (R 966, 967; 1032, 1033) *He was assured at this time that although there had previously been a pollution problem, it had been cured.* (R 966, 967; 1032, 1033) *Goldstein's concern at that time about a pollution problem was not based upon any knowledge of a specific polluting condition, but rather was based upon his general concern due to the dirty nature of the operation and an awareness of pollution problems in general from his reading of newspapers.* (R 1032, 1033; 1048-1050) *In particular, he had not seen the stream (Naylor's Run) at this time, and he had no knowledge of long term complaints about the pollution of the stream created by Jacoby's activities over the years he had operated the business.* (R 1047)

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3. NWP, Inc. is a Pennsylvania Corporation formed by Harris and Alan Goldstein, on July 9, 1963. On August 30, 1963, the Pennsylvania Corporation, known as National Wood Preservers, Inc., which had been incorporated by Jacoby on January 24, 1947, changed its name to Eagle Wood Preservers, Inc., and filed an Out-Of-Existence Certificate with the State on September 11, 1963. On September 9, 1963, NWP, Inc., amended its Articles of Incorporation to change its name to National Wood Preservers, Inc., the present Appellant. (See Stipulation Between Counsel for All Parties, R 136, 137).

As a result of his general concern that any pollution problem had been cured, he insisted that a clause be inserted in the July 30, 1963 stock purchase agreement (Examiner's Exhibit 12, paragraphs 8h, R 70-85) to warrant that any pollution problem had, in fact, been cured. (R 966, 967; 1048-1050)[4]

Following the Goldstein's purchase of the stock of Wood from Jacoby, they continued as a tenant of Rogers, to run the business on the same physical site previously used by Jacoby. Under the arrangement, whereby the Goldsteins purchased the stock of Wood from Jacoby, it was agreed that Jacoby would remain for a year to aid them in operating the business. (R 967) However, a little less than two (2) months later, on September 17, 1963, Jacoby was arrested by the Pennsylvania State Police for polluting.[5] (R 873, 874, 886, 967)

As a consequence of the arrest of Jacoby and the revelations to Goldstein of a pollution problem, Goldstein and the Township Health Supervisor, as well as representatives of the Pennsylvania Sanitary Water Board met at or around September 20, 1963, to discuss steps to be taken by the Goldsteins to clean up the business premises formerly run by Jacoby. (R 886, 887, 892-894, 968, 969)[6]

As a result of the conference, it was agreed that the Goldsteins would hire a consultant to prepare a report

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4. Paragraph 8(h) of the Agreement of July 30, 1963, between NWP, Inc. and Jacoby, reads as follows:

"8 Jacoby represents and warrants that

* * *

(h) There is no litigation pending or threatened against it by any agency or instrumentality of the Federal, State or local governments, except for a change of stream pollution since cured."

5. As of this date, Goldstein had already paid to Jacoby, the sum of Two Hundred Forty Four Thousand ($244,000.00) Dollars toward the full purchase price of Five Hundred Eighty Thousand, Seven Hundred and Twenty ($580,720.00) Dollars. (See R 70, 86).

6. The Sanitary Water Board was the predecessor state agency to DER, the present Appellee.

recommending the steps to be taken by them to satisfy the state and township officials about the pollution problems. (R 968-970; Exhibits NWP 4 and NWP 5, R 116-129)

The Goldsteins completed every step set forth in the report in accordance therewith; finished all such steps by the required target date of June 1, 1964, advised the Sanitary Water Board of each step in the process as it was completed and received approval for the work after inspection by the Board after the completion of each step, as well as an overall approval of the work. (R 968-978; 1027-1032; Exhibits NWP 6, 7, 8, 9 and 10; R 103-134)

The overall cost incurred by the Goldsteins in making all of the State required and State approved changes set forth in 1964 was approximately Seventy Five Thousand ($75,000.00) Dollars. (R 1030)

As a further part of the agreement with the State in 1964, the Goldsteins agreed on a going forward basis to police the creek every day by collecting any oil floating on the surface. The cost to Appellant Wood of policing the creek on a daily basis since 1964 and of making the above changes has cost appellant One Hundred Forty Five Thousand, Two Hundred ($145,200.00) Dollars as of the date D.E.R. issued its enforcement order.

As a result of Jacoby's arrest, the Goldsteins consulted their attorney about attempting to force him to buy back the stock of the business. However, they were advised that because of the costly and protracted nature of such legal proceedings, they would be better off if they met with State and township officials in order to correct the pollution problem. (R 967, 968)

By Agreement dated December 31, 1964, the Goldsteins in consideration for receiving from Jacoby the sum of Thirty Five Thousand ($35,000.00) Dollars, released Jacoby from the warranty in the July 30, 1963 stock purchase agreement that the pollution problem had been incurred. (Exhibit E-13, R 86-89; 183-185)

This Agreement (Examiner's Exhibit 13, R 86-89) *states that although the Goldsteins "have made certain demands and claims upon Jacoby including a claim that stream pollution exists in breach of paragraph 8H of the stock purchase agreement" said claims "have been disputed by Jacoby.* (R 86-87) The Agreement further points out that *the Thirty Five Thousand ($35,000.00) Dollar reduction in the purchase price of the business was only partially for the cost expended by the Goldsteins in correcting and curing the alleged stream pollution problem and partly for claims related to the financial conditions and affairs of the company.* (R 87)

On February 10, 1967, Appellant Wood gave up a portion of its leasehold interest on the leased premises so that Rogers could, in turn, lease same to Shell. (Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #6 A-53) and Shell has operated and maintained a gasoline station on that parcel ever since leasing the premises on February 10, 1967. (Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #7 A-54)

Gum occupies a parcel of land on the opposite side of Eagle Road from the parcels owned by Rogers and occupied by Shell and Wood. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #8 A-54)

On July 12, 1973, the DER issued the Orders above mentioned.

From these Orders, all parties appealed to the Environmental Hearing Board.

The Adjudication of the Environmental Hearing Board

In its Adjudication and Order of July 30, 1976, the Environmental Hearing Board found as a fact that the pollution problem in question had been caused by the conduct of Jacoby in pumping pentachlorophenol into

the well above referred to. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #4 A-53, and Footnote 13, A-84)

The Board further found as fact that the present Appellent Wood, under the operation of the Goldstein family ". . . has not discharged or permitted the discharge of industrial waste into the waters of the Commonwealth" (see Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #5, A-53); *and also found that Wood by its present management, the Goldstein family, has cooperated with the DER and its predecessor entity, the Pennsylvania Department of Health, Sanitary Water Board, in the earlier efforts to remedy this pollution problem on and off the property which Appellant Wood occupies.* (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #80 A-72)

The Board found that the pentachlorophenol in question was under the surface of the property leased by Appellant Rogers, to Appellee Shell and Appellant Wood; that this pentachlorophenol flowed southwesterly under Eagle Road, a highway owned and maintained by the Commonwealth of Pennsylvania and that thereafter it infiltrated under the surface of property owned by Appellant Gum into a storm sewer pipe on the property of Gum maintained by appellee, Township of Haverford, and that the pentachlorophenol traveled through the storm sewer pipe and was discharged at its terminus into Naylor's Run. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #72 A-70)

The Board determined that the pentachlorophenol is under the property owned and maintained by the Commonwealth of Pennsylvania and the Township of Haverford and by landowners or occupiers, the identity of whom or which were not disclosed in the proceedings before it. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #74(b) A-70, 71)

It found also that in order to determine the volume of pentachlorophenol under the surface of the property owned or leased to Appellants, including Appellant Wood and how widely the pentachlorophenol was disbursed thereunder, many more wells would have to be drilled on the property to the water table and additional samples from these wells taken. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #76 A-71)

It found finally that it was impossible to assess the cost of the removal program until further drillings, testing and sampling was completed; and, the participation of landowners and occupiers, in addition to the Appellants, would be necessary in order to complete the drilling, testing and removal program. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #78 and #79 A-72)

All Appellants challenged the constitutionality of §316 of the Clean Streams Law on the basis that it was unconstitutional since it punishes a "status" and required them to assume responsibility to correct a condition which none of them caused, created or were at fault in continuing. (R 192-197; 33-35). They also challenged the constitutionality of §316 on the grounds that it was invalid ex post facto legislation. (R 192-197; 33-35)

As to all such attacks on the constitutionality of §316 of the Clean Streams Law, the Environmental Hearing Board ruled that it did not have the authority to pass upon the constitutionality of §316 of the Clean Streams Law and that it would assume the constitutionality thereof for the purposes of its Adjudication. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, A-74)

Appellants also argued and contended that the DER was applying §316 in an unconstitutionally discriminatory fashion particularly because of its failure to include in the proceedings, Jacoby as the party who had created the polluting condition and other property owners, in-

cluding the Township of Haverford and the State Department of Highways, under whose property the polluting condition was also found to exist. Prior to the hearings before the Environmental Hearing Board, Shell had petitioned to join Jacoby as an additional defendant, pursuant to the State Civil Procedural Rules, on the basis that he was the party responsible for causing the condition. DER opposed this joinder and the Board sustained that position, denying the Petition on the grounds that only DER had the authority to bring Jacoby upon the record. *In re National Wood Preservers*, 64 D&C2d 78 (1974), A-91. DER at no time sought to join Jacoby in those proceedings.

In its Adjudication, the Board in dismissing the contentions of discriminatory enforcement, alluded to the fact that §316 of the Clean Streams Law permitted DER to ignore the issue of fault in proceeding to recover clean-up costs. It stated:

> ". . . *Section 316 clearly authorizes the Department to ignore the issue of fault, as it is done here, and proceed against whoever owns or occupies land so as to remedy a pollution problem as quickly as possible. We might perfer a more delicate balancing of responsibility in the Department's actions, but we cannot say their approach is unauthorized.* (Adjudication of Environmental Hearing Board, July 30, 1976, Footnote 13, A-84)

The Board also ruled that it would restrict any Order against the Appellants so that they would be required to take corrective measures only upon property owned or occupied by them.

After disposing of all of the arguments raised by the various Appellants in the proceedings before it, the Board issued its Adjudication.

The Commonwealth Court Decision

On appeal, *the Commonwealth Court ruled that §316 could not constitutionally be applied to any of the*

parties before the Board based solely upon their ownership or occupancy of land.

The Court went on, however, to point out that where a statute can be given two constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be invoked.

Relying on this principle, the Court held that there was a construction of §316 which both comports with the law of public nuisance and renders that section constitutional as applied to the factual situation present in this case.

As stated by the Court, *where a polluting condition has been created by the conduct of an individual other than an owner or occupier of the land*, that owner or occupier *can be ordered to take corrective measures if after knowing of the existence of the condition on his land, he engages in some affirmative conduct indicating his adoption of the condition.*

In discussing this theory, as it related to Appellant Wood, the Court found that in not "divesting" itself of the business after Jacoby's arrest, by accepting a Thirty Five Thousand ($35,000.00) Dollar credit from Jacoby in reduction of the purchase price for his stock, together with its actions in taking "measures to correct the pollution problem", it engaged in such "affirmative conduct" as would be an "adoption" of that condition.

As a result of determining that Wood engaged in such affirmative action, the Court held that it had adopted the polluting condition and dismissed Appellant's appeal and affirmed the Order of the Board. The Court also dismissed the appeal of Rogers, the owner of the property leased to Shell and Wood on the grounds that they had adopted the condition as well. With respect to Gum and Shell, however, the Court found that neither of those entities had engaged in "affirmative conduct" constituting an adoption of the polluting condition and therefore sustained their appeals and dismissed the mat-

ter as to them. (Commonwealth Court's Opinion, A-40, 41)

From the Order and Opinion of the Commonwealth Court, Appellant Wood filed a Petition for Review to the Pennsylvania Supreme Court which was granted as No. 66 January Term 1979 and consolidated for argument with the Appeals filed by Clifford and Virginia Rogers (No. 67 January Term 1979) and an Appeal filed by DER (No. 68 January Term 1979), from that portion of the Commonwealth Court's Opinion and Order which dismissed the matter as to Gum and Shell.

The Pennsylvania Supreme Court's Decision

The Pennsylvania Supreme Court in its Opinion of April 24, 1980, acknowledged that this was "a case of first impression", calling for the construction and a determination of the constitutionality of §316 of the Clean Streams Law. (*National Wood Preservers, Inc. vs. Commonwealth of Pennsylvania, Department of Environmental Resources*, ____ Pa. ____, 414 A.2d 37 (1980), see Appendix, A-1)

> "This is a case of first impression. At issue is the construction and constitutionality of Section 316 of The Clean Streams Law, Act of July 31, 1970, P.L. 653, §12, amending 35 P.S. §691.316." (414 A.2d at pg. 38; Appendix at A-2)
>
> * * *
>
> "The principal questions presented by this appeal are whether Section 316 authorizes the Department of Environmental Resources to remedy water pollution resulting from conditions other than mine drainage, and whether Section 316 is a constitutional exercise of the Legislature's police power." (414 A.2d at page 39; Appendix at A-2)

The Court first found that this section properly applied to pollution from conditions other than mine drainage. It then took up the question of the Statute's constitutionality, stating,

"Appellants' second contention is that Section 316 of The Clean Streams Law is an impermissible exercise of the police power, in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution." (414 A.2d at page 42; Appendix at A-9)

The Court stated Appellant's position as follows:

"Appellants do not argue that Section 316 is 'unduly oppressive' because of its economic impact or its interference with their use of the property. Rather, Appellants advance the somewhat unique argument that Section 316 is unduly oppressive because it imposes liability upon Appellants solely on the basis of their ownership or occupancy of the land in question." (414 A.2d at page 45; Appendix at A-16)

The Court then made clear that it would not decide the case on State law concepts of "fault", causation or the theory of "adoption" articulated by the Commonwealth Court, but rather would deal directly with the constitutional question presented. Said the Court:

"16. Appellants assume that they have acted without 'fault' and have not 'caused' the pollution. In light of our disposition of this case, we need not consider this assumption." (414 A.2d page 45, Footnote 16; Appendix at A-16)

The Court, stating that it disagreed with Appellant's argument, held §316 to be a constitutional exercise of the State's police power:

"We disagree. First it is absolutely clear that the corrective orders here are based on much more than mere ownership or occupancy. As discussed above, they are based upon legislation designed to eliminate all water pollution, and the Environmental Hearing Board's findings that a substance, deter-

mined to be pollution, resides under appellant's land and can feasibly be removed. There is thus a reasonable and concrete basis for the corrective orders here." (414 A.2d at page 45; Appendix at A-16)[7]

The concurring opinion of Justice Flaherty stated that the majority opinion was actually providing for an unconstitutional imposition of liability, based solely on ownership or occupancy of property. He, therefore, concurred only in the result since he accepted the theory of "adoption" articulated by the Commonwealth Court. He said:

> *"A reading of the majority opinion might lead to the belief that we adopt the strict liability construction of Section 316 which would compel the expenditure of financial sums by an owner or occupancy (sic) of land based on no other factor but the ownership or occupancy of the land."* (414 A.2d at page 47, Concurring Opinion, A-21)
>
> Justice Flaherty then stated his belief that an excercise of the police power had to be associated with the *use* to which one puts his property and not his mere ownership or occupancy. He said:
>
> * * *
>
> *"It has always been recognized that the 'right' of property ownership carries with it a concurrent*

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7. The Court's statement that the Environmental Hearing Board had found that the pollution "can feasibly be removed" was apparently referring to *technical* or scientific feasibility *rather than economic feasibility*. The Environmental Hearing Board specifically found as a fact that there was insufficient testing performed to determine the total volume of material under the property owned or leased by Appellants or how widely it was disbursed under the surface of Appellant's property. (Adjudication of Environmental Hearing Board, July 30, 1976, Finding of Fact No. 73 (a) and (b), A-70). Accordingly, it found that it was "impossible to assess the cost of such a removal program until further drilling, testing and sampling is completed." (Adjudication of Environmental Hearing Board, July 30, 1976, Finding of Fact, No. 78, A-72).

'obligation' which is inherent in the basic relationship of an 'owner' of property to society. These 'obligations', however, have always related to the use one puts to property, not mere ownership. The ancient maxim of the common law is, 'Sic utere tuo ut alienum non laedus', 9 Coke 59—So use your own property as not to injure your neighbor. Where society requires, the property of another can be taken, but only with due compensation. *To construe the subject Act as providing for strict liability, based on nothing more than the ownership or occupation of land, would be to impose on innocent individuals, the burden which should be borne by society as a whole, thus, an unconstitutional taking. I, thus, concur only in the result."* (414 A.2d at page 48; Concurring Opinion, emphasis added, A-23, 24)

Notice of Appeal from the Court's Judgment to the Supreme Court of the United States was filed with the Lower Court on July 3, 1980.

THE ISSUES ARE SUBSTANTIAL

Section 316, which has been declared constitutionally valid by the highest court in the State of Pennsylvania, appears to be strongly rooted in the desire to advance social purposes by restoring the environment. Nevertheless, in its sweep, by imposing liability on nothing more than status and geographical proximity to a polluting condition, it so drastically infringes on personal and property rights as to raise anamolous visions of oppressive results that defeat the very essence of the social aims which apparently inspired this legislation.

For example, consider the possibility for injustice if this law existed in the State of New York. The media constantly reminds us of the families who own or rent property built over the toxic dump which is Love Canal. These people live in fear of cancer, deformed infants and

other health horrors created by the chemical dumping there years ago. Yet, under the statute here at issue, these people who did not create this problem and who suffer drastically from it, could be forced to clean up the pollution at unlimited cost and without any attempt at all by the government to first seek restoration from the chemical companies who created the problem. This is not a mere abstract hypothetical possibility in light of what happened in this case.[8]

An environmentally awakened society is discovering new "Love Canal" type dump sites every day. Should the cost of this problem be borne by the government as a whole or by the poor unfortunate people located over the geographical confines of such a dump?

If the problems at the "Three Mile Island" nuclear generating plant in Harrisburg, Pennsylvania, created an escape of radioactive material which seeped into local water supplies, the families most harmed by the problem could be expected under this legislation to clean it up.

The Statute here at issue pushes the use of the State's "police power" to a new horizon which it is sincerely believed has not yet been judicially considered by this Court.

To focus in sharply on what is at stake herein, it is perhaps wise to point out what Appellant sincerely believes is not involved in this case.

This is not a situation in which the State has exercised its "police power" to place a mere prohibition or restriction upon a lawful use of property, which reduces the economic value of the property. (See *Hadacheck vs. Sebastian*, 239 U.S. 394, 60 L.Ed. 348, 36 S.Ct. 143

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8. The Statute at issue in this case has no provision which requires the State to first proceed against the party responsible for creating the polluting condition before seeking to hold landowners or occupiers effected thereby responsible to eliminate it. In this very case, the DER resisted efforts to join the party responsible while at the same time proceeding against the innocent Appellants. *In re National Wood Preservers, Inc.*, 64 D&C2d 78 (1974) at A-91).

(1915); *Goldblatt vs. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962))

Nor, is this a case in which a State, through the exercise of its "police power", orders a property owner to destroy a portion of his property in order to preserve other property. *Miller vs. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928)[9]

It is also not a case in which a State, through the exercise of its "police power", imposes affirmative cost obligations on a property owner in connection with some business or other justifiable use by the property owner of his property. See, *Queenside Hills Realty Co., Inc. vs. Saxl*, 328 U.S. 80; 90 L.Ed. 1096 (1946); *Atchison, Topeka & Santa Fey R. Co. vs. Public Utilities Commission*, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 (1953)[10]; or in which a limited fine, as distinguished from unlimited clean-up costs, is imposed upon a property owner for the negligent or criminal act of a third person, but *which could only have occurred because of the property owner's use of its property or operation of its business. United States vs. General Motors Corporation*, 403 F.Supp. 1151 (D. Conn. 1975); *United States vs. Marathon Pipe Line Co.*, 589 F.2d 1305 (7th Cir. 1978); *United States vs. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir.

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9. Even in *Miller vs. Schoene*, supra, the property owner was reimbursed for the cost of removing and destroying the ornamental red cedar trees which he had been ordered to destroy because of rust disease.

10. In *Queeenside Hills Realty*, supra, the police power was used to require a property owner to install a sprinkler system in a lodging house in accordance with a state law which required the installation of such systems in all multiple dwelling lodging houses. There, the imposition of new costs was placed upon the property owner *in connection with his continued use of the property as a lodging house* renting it to boarders who should be protected from the hazard of fire as much as possible. In *Atchison, Topeka, Santa Fey Ry Co. vs. Public Utilities Co.*, supra, the costs were imposed in connection with the railroad's continued use of the grade crossing in question.

1978)[11] In the present case, the findings of the Environmental Hearing Board, affirmed on appeal, establish that the condition was created by the unlawful activities of Jacoby years before the business was purchased by the Goldstein family, and that Wood, through the management of the Goldstein family, has not discharged or permitted the discharge of industrial wastes into the waters of the Commonwealth. *Under these circumstances, the polluting condition created before Wood acquired possession of the property, occurs without its intervention, is unrelated to its use of the property and will continue on from day to day, irrespective of its presence or*

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11. An examination of the various provisions of §311 of the Federal Water Pollution Control Act (33 U.S.C.A. §1321), discussed by the Court *United States vs. Tex-Tow, Inc.*, supra, as contrasted with §316 of the State law in the present case, is instructive in dealing with the issue of the oppressive nature of §316. The Federal Water Pollution Control Act is considerably less oppressive in its operation than §316 of the Pennsylvania Clean Streams Law here under attack. *Under the Federal Statute, unlike §316 of the State law, clean-up costs, which are unlimited, cannot be assessed against an operator of a facility if the spill or discharge resulted from an act or omission of a third party.* (33 U.S.C.A. §1321(F); *United States vs. Tex-Tow, Inc.*, supra). On the other hand, *the limited civil penalty provisions* of the Federal Act, permit a penalty to be assessed against the operator of a facility even if it does result from the act or omission of a third person. *In that case, however, liability is based on causation which is found to exist because the Defendant engages in an enterprise or activity that of necessity may result in spills, irrespective of his use of all precautions. See United States vs. Tex-Tow, Inc.*, supra, 589 F.2d at page 1314; *United States vs. Marathon Pipe Line Co.*, supra, 589 F.2d at page 1309. Additionally, in dealing with the limited civil penalty provision of the Federal Act, the Defendant's culpability and his ability to pay a limited fine must all be considered in determining the amount of the civil penalty. See, *United States vs. Tex-Tow, Inc.*, 589 F.2d at page 1313. Under §316 of the law, however, liability is unlimited, does not depend upon on whether the activity, enterprise or use to which the land owner or occupier puts his property might result in a risk of pollution and is not limited by his degree of culpability or ability to pay, it simply rests upon mere ownership or occupancy of the property itself.

absence from the property. More importantly, the Statute does not require any nexus between use and landownership or occupancy before liability can be imposed.

This is not even a case involving an innocent owner's forfeiture of property because of the criminal acts of his Lessee. See *Calero-Toledo vs. Pearson Yacht Leasing Co*, 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974).[12]

Finally, this is not a case in which a landowner or occupier is assessed for improvements made in front of the property occupied by him. Such assessments are uniformly upheld only to the extent that special benefits accrue to the property assessed. See 16A C.J.S. Constitutional Law §661, pgs. 1035-1042 and particularly, at pages 1037, 1038 and cases therein cited. In the present case, no claim is made that removal of the pollutant will benefit the Appellant who is a tenant of the surface land.

Rather, what is at stake in the present case is the propriety of a State's raw, naked right through the use of its "police power" to impose on a land owner or occupier, the affirmative obligation to eradicate, at unlimited costs, a polluting condition, based on nothing more than that land occupier's status and geographical proximity to the condition in question.

If the validity of this Statute is affirmed without further consideration by this Court, it may signal legislatures in other states desirous of attacking pollution problems, that they may now abandon previous statutory enactments designed to strike an acceptable balance between accomplishing desireable environmental goals and protecting the rights of private individuals, in favor of expedient, but oppresive laws which eliminate any consideration of such rights.

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12. In the forfeiture case, the innocent owner's responsibility is limited to the value of the property forfeited and his liability arises out of the third party's use of the forfeited property with his consent. In the present case, however, the owner or occupiers' liability is unlimited and unrelated to the use of the property.

The Pennsylvania Supreme Court has Misconstrued Prior Holdings of this and Other Courts in Dismissing *Appellant's Contention that the Statute is Unduly Oppressive*

The decision by the Pennsylvania Supreme Court in this case does not blend neatly with the past holdings of this Court which dealt with police power legislation. Appellant's belief that the Statute is "unduly oppressive", is founded upon a multi-faceted combination of factors not present in the cases cited by the Pennsylvania Supreme Court as precedents.

It is submitted that the combination of oppressive features found in Section 316 are sufficient to overcome any presumption concerning the constitutional validity of this legislative enactment.

The Government is Not Merely Regulating Past or Present "Use" of the Property by the Party to be Charged With Liability, but Instead is *Taking Resources from the Most Expedient Source at Hand*

As the Supreme Court of Pennsylvania has correctly pointed out, reduction of property value due to regulation as to use has to be complete before there is a "taking." *Hadacheck v. Sebastian*, supra.; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,43 S.Ct. 158, 67 L. Ed 322 (1922). Even when complete destruction of private property used in an individual's business enterprise is reasonably necessary to protect the rest of the community, the destruction of that property does not constitute a compensable taking. *Miller v. Schoene*, supra.

If a complete loss of property can be justified for the purpose of ensuring the safety of the community, does this mean that there is no limit on the police power? Even in *Miller v. Schoene*, *supra*, the owner of the offending trees which were destroyed for the public good was not required to pay for the cost of destroying or removing them.

Appellant is not asked to change the method of its

wood preserving operation or limit its activities; nor is it prohibited from putting its property to a more profitable use because of zoning, or regulation such as was encountered in *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L. Ed. 2d 631 (1978), relied on so heavily by the Pennsylvania Court. The "taking" in this case does not need to be found through a complex analysis of whether or not the government is prohibiting some valuable use of property, or is physically occupying it. Here, Appellant is being ordered to take affirmative action to eradicate pollution present under the surface of property which it leases for its business at enormous expense and without regard to its use of that property.

The decisions cited by the Pennsylvania Court to sustain the proposition that the police power can constitutionally require the positive expenditure of funds involve more than mere ownership or occupancy of property, i.e. they deal with regulation of activity on the property related to the use of that property.[13] For that reason, the property owner in those cases had the choice of incurring the cost or ceasing the activity in question.

Appellant has no such choice between complying with the Order or ceasing its activities. It has been ordered to eradicate a condition which will exist in the ground waters whether or not Appellant continues to operate its business as before. Additionally, the business can be carried on with or without the existence of the polluting condition under the ground.

Appellant's use of the property leased from Rogers has continually been confined to the surface of the land. Appellant's operation of its wood treatment facility was made clean at the beginning of its operation, seven years before the enactment of the present statute. How, then, can the remedial legislation be connected to Appellant Wood under the operation of the Goldsteins?

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13. These cases are discussed at Footnote 10 above.

The State court has also cited modern cases imposing liability on landowners for the negligent acts of third persons. See, i.e., *United States vs. General Motors Corporation*, 403 F.Supp. 1151 (D.Conn. 1975); *United States vs. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978). The distinguishing characteristics of those cases is that the enterprise or activity in which those Defendants engaged of necessity entailed the risk that pollution would occur even though they took all precautions possible. Additionally, those cases dealt with a statutory scheme which imposed a limited fine, not unlimited clean-up costs, and which considered the Defendant's ability to pay and culpability in bringing about the polluting condition in question. Those factors are all notably absent from §316 which imposes unlimited clean-up costs on blameless parties and without considering their ability to pay or culpability. (See Footnote 11 above)

The Statute Imposes Strict Liability
Upon a Landowner or Occupier for the
Illegal Act of a Third Person Without any Requirement on the
State to Proceed Against That Person

It is contrary to all notions of fair play that the State was free under §316 to ignore Jacoby as the party responsible for creating the polluting condition. The Statute does not require the State to proceed against the party responsible for creating a polluting condition before it seeks to impose liability on land owners or occupiers effected by the pollution. In this very case it successfully resisted Jacoby's joinder based on the statutory scheme of prosecutorial responsibility set forth in the Pennsylvania Clean Streams Law. (*In re National Wood Preservers*, 64 D&C2d 78 (1974); A-91)

It was stipulated at the beginning of the hearings in this case that the *sole* basis for proceeding against Appel-

lant Wood was the language of §316. No effort was made to proceed against it as an actual polluter under various provisions of the Clean Streams Law which deal with action against polluters.

What Appellant Wood is confronted with, is a Statute denominated as civil by the Courts, supposedly imposing affirmative duties upon innocent landowners and occupiers, regardless of fault, the enforcement of which has all of the trappings of a criminal proceeding.[14] The government has been upheld in its statutory right under §316 to pick and choose Defendants without the usual right, generally present under modern rules of civil procedure, of permitting joinder of all parties who are required for a complete resolution of the matter. If the matter is criminal, then the Statute must fall because it punishes status without any act or mens rea requirement. *Robinson vs. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed2d 758 (1962).

The Strict Vicarious Liability
is Being Imposed Retroactively

It is not unreasonable to impose vicarious liability upon a party for acts of persons under the dominion and control of the party held responsible. It also may not be unreasonable to impose liability retroactively for prior acts of the very party held liable, or persons subject to their control. *Barnes & Tucker Co. vs. Pennsylvania*, 472 Pa. 115, 371 A.2d 461 (1977)

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14. Section 602 of the Act (35 P.S. §691.602) provides for stern fines and jail sentences on a progressively more severe basis. The full text of the Act is reproduced in the Appendix at A-113. This section of the law provides that every day of continued violation of any Order of the Department shall be a separate offense. It is not hard to imagine how fines and jail sentences could cumulate to an onerous penalty. In summary, therefore, §316 permits retroactive application of the penalty provision of §602 to punish a party solely on the basis of that party's status and for the acts of a third person committed years before the Statute came into existence and for a status which was also acquired years before the Statute was enacted.

However, it is beyond the pale of reason to impose retroactive liability for the acts of third persons, upon a party who neither controls such third persons nor had knowledge of the true nature of their acts, based upon a Statute passed by a legislature fourteen (14) years after the occurrence of such acts. *United States vs. Johns-Manville Corporation*, 245 F.Supp. 74 (E.D. Penna. 1965); *Usery vs. Turner Elkhorn Mining Co.*, 428 U.S. 1, 49 L.Ed.2d 752, 96 S.Ct. 2882 (1976). This is precisely what §316 permits and what occurred in this case.

Recent cases have allowed considerable latitude in permitting retroactive application of regulatory legislation, but only *where the cost of the remedy for a problem is allocated to the person charged with the liability under the Statute as an "actual, measurable cost of his business"*. *Usery vs. Turner Elkhorn Mining Co.*, supra. A more recent decision of this Court would indicate that retroactivity of legislation is not a factor which can be simply ignored. *Allied Structural Steel vs. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).

Retroactive liability for the acts of third persons under §316 does not require that the polluting condition arise in the course of the landowner or occupier's business and in this respect, does not come under the holding of *Usery vs. Turner Elkhorn Mining co., supra.*

Similarly, this case is not one in which retroactive legislation should be justified based upon an "emergency". *Lichter vs. United States*, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948).

This Statute requires a person who went into possession of property seven (7) years before it was enacted to clean up a condition created by the illegal activities of a third party it did not control and carried out by that party fourteen (14) years before the Statute was enacted. It passes the bounds of reasonableness under the due process provisions of the 14th Amendment.

The Statute Impairs the Contractual Expectations of Tenants and *Past Purchasers of Property*

One of the serious oppressive features of §316 is that it tends to introduce new dangers and pitfalls into common transactions such as buying or leasing property. The normal expectation of a purchaser or lessee of surface rights to property is that he will get good title or the right to use property for legal purposes.

What can be expected from this statute are variations of what happened to Wood in this case. The State, wishing to have instant gratification, will attack the easiest party to find, be it record owner or the person who is present on the land, and use quasi-criminal sanctions to compel a recovery for the purpose of abating polluting conditions.

Instead of proper and cooperative efforts with governmental agencies to find and correct polluting conditions, owners or occupiers who discover such conditions, not created by themselves, will be encouraged to conceal the conditions and pass them off to unsuspecting buyers.

The liability imposed by the Statute is imposed equally upon owners and occupiers. The definitions section of the Statute does not define "occupier". Since no warning is provided to would-be renters of surface rights to property that they will be required to correct polluting conditions existing under the land, created by a third party, any enforcement of strict liability against such a person impairs that person's rental contract with his landlord. Even if upheld as against the owner of property, absent any requirement of culpability or negligence, the Statute unfairly reallocates, even if temporarily, the responsibility for pollution which was created prior to the Leasee's occupancy. *Allied Structural Steel Co. vs. Spannous*, supra.

No effort is made to classify occupiers on the basis of the duration of their leasehold interest. A tenant with

a six (6) month Lease is subject to the same responsibility as a landowner who has owned the property for twenty (20) years.

The Statute Gives Unlimited Discretion
to the Law Enforcement Agency with Respect
to What May be Required by Way of Compliance is Subject to Abuse

The orders in this case are open ended in that compliance is conditioned upon DER's "acceptance" of plans and specifications of work to be done by Appellant, without any indication as to what standard, if any, will govern the acceptance. Order of Environmental Hearing Board, July 30, 1976. (A-87)

"It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may be done under it." In *Curtin vs. Benson*, 222 U.S. 78, 32 S.Ct. 31, 56 L.Ed.102 (1911).

Orders in the form upheld by the Court, place Appellants at the mercy of DER and in a position of corporate involuntary servitude. At this writing, almost seven (7) years, to the day, after the issuance of the original DER Orders, and after an expenditure of approximately One Hundred and Eighty Thousand ($180,000.00) Dollars on the pollution problem by the Federal government, there exists no concrete answer as to how much expense and effort by Appellant will be required in complying with the DER orders as modified by the Environmental Hearing Board.[15] It would appear that the DER is free to determine whatever it wishes with regard to the level of compliance expected, without limit.

In addition, DER is in a position to force Appellants to experiment on methods to solve the problem. The experimental activity, if determined by Board fiat to be "feasible", will mean that Wood will be expending funds to devise new methods of dealing with the problem

15. See Appendix at A-121-136.

which more properly should be borne by the government.

The Selective Enforcement Techniques Being Used in the Enforcement of this Statute, as Illustrated in This Case are Onerous and Oppressive and May Well Rise to a *Level of Denial of Equal Protection Under the Law*

In its Adjudication, the Board found that the polluting condition not only exists under the property owned or occupied by other parties to the litigation, Gum and Shell, but that it also existed under the property owned and occupied by several other parties, including the Commonwealth, Haverford township and other persons, the identification of whom were not disclosed in that proceeding. The Board also found that the participation of such landowners or occupiers was necessary to complete the removal program. Finally, the Board held that as applied to Appellant and other parties then before it, Section 316 could require them to correct a polluting condition "only on the land, which is owned or occupied by such person or entity and that it would be "unconstitutional to require the Appellant to take action outside his or its land".

The Commonwealth Court and the Pennsylvania Supreme Court have, by silence, affirmed these findings. They have also removed Shell and Gum from these proceedings. In essence, Wood, together with Rogers, will be required to attempt to remove a polluting condition under their property, which cannot be removed without the cooperation of other landowners or occupiers, who by the lower Court's decision, cannot be proceeded against to give such cooperation. Under these circumstances, requiring it to expend the funds necessary to attempt to remove the pollutant, would be a vain and wasteful act.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction in this matter to review and reverse the Order of the Supreme Court of Pennsylvania.

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No. 80-90

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NATIONAL WOOD PRESERVERS, INC., *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, CLIFFORD ROGERS and VIRGINIA ROGERS,

Appellees

TOWNSHIP OF HAVERFORD, *Intervenor*

October Term, 1980 No. ———

CLIFFORD ROGERS and VIRGINIA ROGERS, *Appellants*

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NATIONAL WOOD PRESERVERS, INC.,

Appellees

TOWNSHIP OF HAVERFORD, *Intervenor*

ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

JOINT APPENDIX OF APPELLANTS TO JURISDICTIONAL STATEMENTS

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IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NATIONAL WOOD PRESERVERS, INC., CLIFFORD ROGERS and VIRGINIA ROGERS, *Appellants*	Nos. 66 & 67 January Term, 1979
v.	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES *Appellant*	No. 68 January Term, 1979
v.	
SHELL OIL COMPANY, PHILADELPHIA CHEWING GUM COMPANY	

Appeals from orders of the Commonwealth Court of Pennsylvania, dated May 24, 197 , Docket Nos. 1389, 1390, 1395 and 1415 C.D. 1976, affirming in part and reversing in part the orders of Commonwealth of Pennsylvania Environmental Hearing Board dated July 30, 1976, at Docket Nos. 73-253-D, 73-249-D, 73-256-D, 73-346-D.

OPINION OF THE COURT

ROBERTS, J.

This is a case of first impression. At issue is the construction and constitutionality of Section 316 of The Clean Streams Law, Act of July 31, 1970, P.L. 653, §12, amending 35 P.S. §691.316. Section 316 provides in relevant part:

> "Whenever the [Department of Environmental Resources] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the [Department] may order the landowner or occupier to correct the condition in a manner satisfactory to the [Department]. . ."[1]

The principal questions presented by this appeal are whether Section 316 authorizes the Department of Environmental Resources to remedy water pollution resulting from conditions other than mine drainage, and whether Section 316 is a constitutional exercise of the Legislature's police power. Like the Environmental Hearing Board and the Commonwealth Court, we conclude that both questions must be answered in the affirmative. Accordingly, we affirm the order of the Commonwealth Court affirming the order of the Environmental Hearing Board.

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1. The powers of the Sanitary Water Board were transferred to the Department of Environmental Resources by the Act of December 3, 1970, P.L. 834, §30(a), 71 P.S. §510-1(22). The Legislature has invested the Department of Environmental Resources with broad responsibilities and powers in regulating the environment. See 71 P.S. §510-1; see generally James O. Freedman, Crisis & Legitimacy 4-5 (1978).

I

The dispute in this case concerns a parcel of land in Delaware County owned by appellants Clifford and Virginia Rogers and leased in part by appellant National Wood Preservers, Inc.[2] The Rogers have owned this parcel since 1942. In 1947 they leased it to Samuel T. Jacoby and C. David Jacobs, who then assigned the lease to National Wood Preservers, Inc. This company, all of whose stock was owned by Jacoby, conducted a wood preservative business on the parcel between 1947 and 1963. National Wood Preservers, Inc. used a chemical caled pentachlorophenol, "a toxic substance . . . lethal to acquatic organisms in certain concentrations."[3] In the course of its operations, National Wood Preservers, Inc. disposed of waste liquids containing pentachlorophenol by discharging them into a well which drained into the ground waters running beneath the premises. In 1963 Jacoby sold his shares in National Wood Preservers, Inc. to the Goldsteins.[4] The Goldsteins have continued to operate National Wood Preservers, Inc. as a wood preservative business on the land in question.

On June 12, 1972, in response to numerous complaints, the Department of Environmental Resources

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2. The Rogers' parcel is described as: "ALL that certain lot or piece of ground with buildings thereon erected situate in Oakmont, Delaware County, Pennsylvania, on the northwest side of Eagle Road, beginning at a point approximately 150 feet northeast of Lawrence Road, containing 366 feet on Eagle Road, 415 feet on the north line, 300 feet on the west line and 200 feet on the south line."

3. Adjudication of Environmental Hearing Board, R.138a-177a, at R.160a.

4. The July 30, 1963 stock purchase agreement included Jacoby's warranty that all pollution problems of National Wood Preservers, Inc. had been cured. On September 17, 1963, Jacoby was arrested by the Pennsylvania State Police for polluting. By agreement dated December 31, 1964, the Goldsteins released Jacoby from his warranty in partial consideration of Jacoby's $35,000 reduction of the stock purchase price.

(DER) initiated its investigation of an oily substance found in Naylors Run, a stream flowing near appellants' tract. On the basis of this investigation, which included the collection and analysis of numerous water samples from the area around Naylors Run, DER determined that the ground waters of that tract contain a polluting substance of pentachlorophenol and fuel oil. In 1973, pursuant to Section 316 of The Clean Streams Law, DER issued orders to appellants Rogers and appellant National Wood Preservers, Inc. to abate this harmful condition.[5] Appellants appealed to the Environmental Hearing Board. The Board consolidated the appeals and conducted extensive hearings over a thirteen day period. The Board found inter alia that the pentachlorophenol, which was mixed with fuel oil in the waters of the Commonwealth, constitutes pollution within the meaning of Section 316, see 35 P.S. §691.1, and that the major amount of this substance appears to be pooled under the surface of the property owned by Rogers and leased in part by National Wood Preservers, Inc. The Board therefore ordered appellants, under the supervision of DER, first to conduct drilling and water sampling to determine the precise amount and disperson of the pollutant, and then to remove it.[6] The Board also found that the program for removal of the pollutant outlined in its findings and order was feasible.[7] Appellants filed timely appeals to the Commonwealth Court. That Court consolidated the appeals and unanimously affirmed the orders of the

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5. The parties stipulate that the sole authority for DER's orders is Section 316 of The Clean Streams Law.

6. The Board ordered in the alternative that the Department conduct the sampling and removal itself, or so order another person or agency. DER could charge the costs incurred to appellants to the extent that corrective actions were taken on their land. Additionally, the Board retained jurisdiction.

7. The Environmental Hearing Board noted that the issue of ultimate allocation of liability was not before it. Nor is that issue before this Court, and thus we need not express any view on it.

Environmental Hearing Board as to appellants. This Court granted allowance of appeal, also consolidating the appeals.[8]

II

Appellants' first contention is that the Legislature, in enacting Section 316, intended to permit the Department of Environmental Resources to order a landowner or occupier to correct a condition which results in pollution or the danger of pollution only if the condition were caused by mining operations. Like the Environmental Hearing Board and the Commonwealth Court, we reject this contention.

As the previously quoted portion of Section 316 makes evident, the Legislature has clearly and unambiguously authorized DER to require the correc-

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8. Two other actions consolidated previously with the present actions must be mentioned here. When DER issued corrective orders to appellants in 1973, it also issued corrective orders to Philadelphia Chewing Gum Corp. (Gum) and Shell Oil Co. (Shell). Gum owned a parcel of land adjacent to appellants' land, where it manufactured chewing gum products. Shell operated a gasoline station on land leased from the Rogers. Shell's parcel had been leased by National Wood Preservers, Inc. until 1967, when National Wood Preservers, Inc. released this portion of its leasehold to Rogers who rented it to Shell. Neither Gum nor Shell has ever discharged industrial waste into the waters of the Commonwealth when Gum and Shell appealed from DER's orders, the Environmental Hearing Board consolidated their appeals with appellants'. The Board found that the polluting substance beneath appellants' land was also beneath the land of Gum and Shell, and therefore ordered Gum and Shell also to take corrective action. The separate appeals of Gum and Shell from this order were consolidated by the Commonwealth Court with those of appellants. That court sustained the appeals of Gum and Shell on the ground that Section 316 was inapplicable to them. DER failed to file timely appeals from this portion of the Commonwealth Court order, and thus this Court now dismisses the Department's petitions for allowance of appeal as improvidently granted.

tion of water pollution causing conditions without regard to the source of the pollution. Indeed, the caption of Section 316, "Responsibilities of land owners and land occupiers," suggests the section's breadth. See 1 Pa. C.S.A. §1924 ("The headings prefixed to . . . sections and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof."); compare 35 P.S. §691.2B. The Legislature has instructed that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S.A. §1921(b). In accord with this legislative mandate, this Court must conclude that Section 316 authorizes DER's actions here.

Our reading of Section 316 is indeed entirely in harmony with, and fully in accord with, the Legislature's objective, see 1 Pa. C.S.A. §1921(c), as expressly set forth in Section 4 of the Act, 35 P.S. §691.4:

> "(1) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry;
> (2) Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead;
> (3) It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted;
> (4) The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth; and
> (5) The achievement of the objective herein set forth requires a comprehensive program of watershed management and control."

From this "Declaration of Policy," enacted in 1970 along

with the portion of Section 316 relevant here, it is clear that the Legislature seeks to eliminate all water pollution, not only water pollution emanating from mines, and to "reclaim and restore" every polluted stream. Thus any contrary or narrower reading of Section 316 would fundamentally undermine the efforts of DER to achieve these legislative objectives, as well as frustrate the Legislature's fulfillment of its obligation under Article I, section 27 of the Pennsylvania Constitution:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

Nevertheless, appellants claim that Section 316 should be restricted. They cite provisions of The Clean Streams Law enacted in 1965, see Act of August 23, 1965, P.L. 372, five years before enactment of the relevant portion of Section 316, enacted in 1970. It is claimed that these provisions, including Section 4 setting forth the purpose of the Act, demonstrate a legislative concern for mine drainage pollution only. Appellants also cite another provision of Section 316, enacted in 1965 and inapposite here, which permits DER to "order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action." Additionally, they point to Section 316's proximity to Section 315, enacted in 1965, a section concerned with mines.

Our consideration of the history of The Clean Streams Law compels us to reject appellants' limited view of the Legislature's purpose in enacting the relevant portion of Section 316. The 1970 amendments to

The Clean Streams Law remove any doubt as to the breadth of the statute's purpose. Those amendments eliminate from the very 1965 provisions concerning the Act's purpose, upon which appellants rely, any mention or mine produced pollution.

In any case, even the 1965 provisions to which appellants refer lend no support to their contention. There is no doubt, of course, that until enactment of the 1965 amendments to The Clean Streams Law, the Legislature had not yet authorized a state agency to remedy the growing pollution problem posed by mine drainage.[9] See generally *Commonwealth v. Barnes & Tucker*, 455 Pa. 392, 395-401, 319 A.2d 871, 873-76 (1974) (*Barnes & Tucker I*); *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 83-86, 306 A.2d 308, 312-13 (1973). The 1965 amendments were enacted in part to provide an administrative remedy for this problem.

It is equally clear, however, that the Legislature also enacted the 1965 amendments to combat water pollution generally. The dual purpose of these amendments becomes clear upon reviewing the "Findings & Declaration of Policy" enacted as part of the 1965 amendments, §2. Half the findings concerned the problem posed by mine drainage, and the other half concerned the prob-

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9. Prior to the enactment of The Clean Streams Law in 1937, see Act of June 22, 1937, P.L. 1987, §1 et seq., acid mine drainage had been excluded from this Commonwealth's water pollution control. See Purity of Waters Act, April 22, 1905, P.L. 260, §4; and the Act of June 14, 1923, P.L. 793, §1. As enacted in 1937, Section 310 of The Clean Streams Law exempted acid mine drainage "until such time as . . . practical means for the removal of the polluting properties of such drainage shall become known." When The Clean Streams Law was amended in 1945, Act of May 8, 1945, P.L. 435, Section 310 was changed to require the Sanitary Water Board to protect certain clean waters, though it permitted pollution of already polluted streams.

lems of water pollution generally. More important, the declarations of policy expressly stated:

> "It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted...."

This statement of purpose of The Clean Streams Law, never before expressly articulated by the Legislature, did not distinguish between sources of water pollution. Rather, all water pollution was proscribed. Thus even appellants' own argument, turning as it does on the Act as it existed before enactment of the relevant portion of Section 316, must fail.

III

Appellants' second contention is that Section 316 of The Clean Streams Law is an impermissible exercise of the police power, in violation of the Fourteenth Amendment of the United States Constitution and Article I, section 10 of the Pennsylvania Constitution. Again, we agree with the conclusion of the Environmental Hearing Board and the Commonwealth Court to the contrary.

The "police power" is one of the "most essential powers of government...." *Hadacheck v. Sebastian*, 239 U.S. 394, 410, 36 S.Ct. 143, 145, 60 L.Ed. 348 (1915). It has been variously defined as the power "to promote the public health, morals or safety and the general well being of the community," *Commonwealth v. Harmar Coal Co.*, supra at 92, 306 A.2d at 316; see *DePaul v. Kauffman*, 441 Pa. 386, 393, 272 A.2d 500, 504 (1971), or as "the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare," *Commonwealth v. Barnes & Tucker*, 472 Pa. 115, 123, 371 A.2d 461, 465 (1977) (*Barnes & Tucker II*), or as a

power extending to "all the great public needs," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952).[10] The police power is fundamental because it enables "civil society" to respond in an appropriate and effective fashion to changing political, economic, and social circumstances, and thus to maintain its vitality and order. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 668, 8 S.Ct. 273, 301, 31 L.Ed. 205 (1887). "The police power of the state [must therefore be]...as comprehensive as the demands of society require under the circumstances." *Barnes & Tucker II* at 126, 371 A.2d at 467. Of necessity, then, the police power is a broad and flexible power. See, e.g., *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-90, 47 S.Ct. 114, 118-19, 71 L.Ed. 303 (1926). Indeed, it is the state's least limitable power. See *Hadacheck v. Sebastian*, supra 239 U.S. at 410, 36 S.Ct. at 145.

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10. In one of this Court's earliest discussions of the police power, we observed that *Gibbons v. Ogden*, 2 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1824) "concedes to the state an 'immense mass of legislation which embraces everything within the territory of a state not surrendered to the General Government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c., are component parts of this mass.' These and others not enumerated constitute police powers — such as are exercised in the passage of laws to promote the peace, safety, good order, health and interests of the state, and are protected by the 9th and 10th articles of the amendments to the Constitution of the United States. The powers reserved to the states (says the 45th number of The Federalist) will extend to all the objects which in the ordinary course of affairs concern the lives, liberties and property of the people, and the internal order, improvement and prosperity of the state."

Craig v. Kline, 65 Pa. 399, 408 (1870). See also *Powell v. Commonwealth*, 114 Pa. 265, 7 A. 913 (1887), *aff'd sub nom. Powell v. Pennsylvania*, 127 U.S. 678, 8 S.Ct. 992, 32 L.Ed. 253 (1888); *Commonwealth v. Plymouth Coal Co.*, 232 Pa. 141, 81 A. 148 (1911).

A state power as broad as the police power inevitably gives rise to tensions between the state and holders of property. Although the police power "may, indeed, seem harsh in its exercise, [and] usually is on some individual,...the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." *Hadacheck v. Sebastian*, supra at 410, 36 S.Ct. at 145; see *Miller v. Board of Public Works*, 195 Ca. 477, 484, 234 P. 381, 383 (1925). Therefore as long as the Legislature exercises that power in a reasonable and nonarbitrary manner, the judiciary will not invalidate the enactment.[11] See *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed. 2d 511 (1957); *Nebbia v. New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 510-11, 78 L.Ed. 940 (1934); *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 9, 331 A.2d 198, 201-02 (1975); accord *Sproles v. Binford*, 286 U.S. 374, 388, 52 S.Ct. 581, 585, 76 L.Ed. 1167 (1932) (even when the reasonableness of legislation is "fairly debatable," the judiciary must refrain from disturbing it).

Review of the case law reveals that the police power has been constitutionally exercised in many ways over innumerable types of property. See generally *Penn Central Transportation Co. v. New York*, 438 U.S. 104,

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11. As Justice Frankfurter in *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 553, 69 S.Ct. 258, 265, 93 L.Ed. 222 (1949) (concurring opinion) observed:

> "Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government.
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> Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophesy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests — the people."

123-28, 98 S.Ct. 2646, 2658-62 (1978). Of relevance here, legislation protecting state water resources has been held to be within the scope of the police power. See, e.g., *Hudson Water Co. v. McCarter*, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Barnes & Tucker Co. v. Pennsylvania*, 434 U.S. 807, 98 S.Ct. 38, 54 L.Ed.2d 65 (1977), *dismissing appeal for want of a substantial federal question*, *Barnes & Tucker II*, supra; *Harmer Coal Co. v. Pennsylvania*, 415 U.S. 903, 94 S.Ct. 1395, 39 L.Ed.2d 460 (1974), *dismissing appeal for want of a substantial federal question*, *Commonwealth v. Harmar Coal Co.*, supra; *Commonwealth v. Emmers*, 221 Pa. 298, 70 A. 762 (1908).[12] Moreover, the police power has been used to impose new costs on property owners. See, e.g., *Atchison, T. & S. F. Ry. Co. v. Public Utilities Comm'n*, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 (1953); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 66 S.Ct. 850, 90 L.Ed. 1096 (1946); *Erie R. Co. v. Board of Public Utility Comm'n*, 254 U.S. 394, 41 S.Ct. 169, 65 L.Ed. 322 (1921).

In *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894), the Supreme Court articulated the standard to be used by courts in determining the validity under the United States Constitution of a state's exercise of its police power.

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public...require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

152 U.S. at 137, 14 S.Ct. at 501. This Court has adopted this standard in our assessment of regulatory legislation under the Pennsylvania Constitution. See *Commonwealth v. Harmar Coal Co.*, supra at 93, 306 A.2d at 317;

12. See generally, *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (dismissal for want of a substantial federal question is a decision on the merits).

Barnes & Tucker I, supra at 418, 319 A.2d at 885; *Barnes & Tucker II*, supra at 123, 371 A.2d at 465.

It is fundamental to our jurisprudence that enactments of the Legislature are clothed with a presumption of constitutional validity, and that appellants, by claiming that an act is unconstitutional, carry a heavy burden of proof. See, e.g., *United States v. Vuitch*, 402 U.S. 62, 70, 91 S.Ct. 1294, 1298, 28 L.Ed.2d 601 (1971); *In re William L.*, 477 Pa. 322, 329, 383 A.2d 1228, 1231 (1978); *Tosto v. Pennsylvania Nursing Home Loan Agency*, supra at 16, 331 A.2d at 205, quoting *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A.2d 835, 840 (1963) ("Courts may not declare a statute unconstitutional 'unless it *clearly, palpably* and *plainly* violates the Constitution.' ").

Appellants do not contend that Section 316 fails to satisfy *Lawton's* first prong. As stated above, Article I, section 27 of the Pennsylvania Constitution imposes a duty upon the Commonwealth to protect our environment. Indeed, maintenance of the environment is a fundamental objective of state power. As Justice Holmes wrote:

> "[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain....It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted...,that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened..., that the crops and orchards on its hills should not be endangered...."

Georgia v. Tennessee Copper Co., 206 U.S. 230, 237-38, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907). The Legislature has long regulated the quality of the waters in the Commonwealth. See Purity of Waters Act, note 9, supra; cf. *Commonwealth v. Locust Point Quarries, Inc.*, 483 Pa. 350, 358, 396 A.2d 1205, 1209 (1979) ("In sum, pro-

tection of air resources is a matter of highest priority in the Commonwealth."). In addition, other state legislatures, as well as Congress, have made extensive efforts to remove the pollution from our nation's waters.[13]

We are also convinced that Section 316 and the orders promulgated thereunder satisfy the first part of *Lawton's* "means" prong. Section 316's authorization of DER to order a landowner or occupier to correct conditions on his land causing pollution or a danger of pollution is "reasonably necessary" for eliminating water pollution. Certainly the owner or occupier of land is well situated to remove harmful conditions from his land. Likewise, the Environmental Hearing Board's abatement orders are "reasonably necessary" in light of the Board's well supported findings that pollution exists under the land of appellants, and that removal of the pollutant is feasible.[14]

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13. See, e.g., *Bridgeport Hydraulic Co. v. Council on Water Co. Lands*, 439 U.S. 999, 99 S.Ct. 606, 58 L.Ed.2d 674 (1978), *affirming mem.* 453 F.Supp. 942 (D. Conn. 1977) (holds that Connecticut Moratorium Act, which restricts sale of surplus lands to limit watershed pollution, is reasonable exercise of police power); *United States v. Ashland Oil*, 504 F.2d 1317 (6th Cir. 1974) (discusses the many dangers of water pollution which justify congressional enactment of the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376); *Chicago Allis v. Sanitary District*, 52 Ill.2d 320, 288 N.E.2d 436 (1972) (holds that ordinance surcharging industrial plants' waste discharge and requiring all plants to install devices to measure discharge is valid exercise of police power); *Candlestick v. San Francisco*, 11 Cal.App.3d 557, 89 Cal. Rptr. 897 (1970) (California's McAteer-Petris Act authorizing Bay Conservation and Development Commission to regulate deposits of fill in Bay held to be constitutional exercise of police power). See generally ALI Model Land Development Code §7-201 (Official Draft, 1975).

14. We find that the record amply supports the Environmental Hearing Board's findings of fact, and therefore will not disturb them. See *Blumenschein v. Housing Authority*, 379 Pa. 566, 573, 109 A.2d 331, 335 (1954) (in absence of arbitrary exercise of agency's duties, "judicial discretion may not be substituted for administrative discretion"); *American Power Co. v. S.E.C.*, 329 U.S. 90, 112, 67 S.Ct. 133, 146, 91 L.Ed. 103 (1946) (The "relation of remedy to policy is peculiarly a matter of administrative competence.") (quotation omitted).

Appellants focus their constitutional attack upon *Lawton's* third requirement that the means are not to be "unduly oppressive upon individuals." Though it is impossible to define this requirement precisely, see *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962); see generally J. L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964), a recent opinion of the United States Supreme Court, *Penn Central Transportation Co. v. New York*, supra, identifies two general factors of significance in the judicial determination of whether governmental action is unduly oppressive. The first consideration is the economic impact of the regulation on the property holder. Id. 438 U.S. at 124, 98 S.Ct. at 2659. Specifically, it is relevant to compare property values before and after the regulation, though such a consideration is by no means conclusive. Compare *Euclid v. Ambler Realty Co.*, supra (regulation reducing property value by 75% held constitutional) and *Hadacheck v. Sebastian*, supra (regulation reducing property value by 87½% held constitutional) with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (regulation rendering property worthless held unconstitutional).

The second factor identified in *Penn Central* is the character of the governmental action. 438 U.S. at 124, 98 S.Ct. at 2659. The greater the extent to which governmental interference with property can be characterized as a physical intrusion, the more likely it is that such interference will be considered an unreasonable exercise of police power. Compare *Goldblatt v. Hempstead*, supra (regulation prohibiting property's most beneficial use is valid exercise of police power) and *Euclid v. Ambler Realty Co.*, supra (regulation prohibiting property's most profitable use held valid exercise of police power) with *Causby v. United States*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (U.S. airplanes taking off and landing over property held to be a taking since U.S. is in effect "using" that property).

Appellants do not argue that Section 316 is "unduly oppressive" because of its economic impact or its interference with their use of the property. Rather, appellants advance the somewhat unique argument that Section 316 is unduly oppressive because it imposes liability upon appellants solely on the basis of their ownership or occupancy of the land in question.[15] It is unconstitutional, argue appellants, for DER to issue a corrective order to a landowner or occupier absent a showing of the party's responsibility for causing the polluting condition.[16]

We disagree. First it is absolutely clear that the corrective orders here are based on much more than mere ownership or occupancy. As discussed above, they are based upon legislation designed to eliminate all water pollution, and the Environmental Hearing Board's findings that a substance, determined to be pollution, resides under appellant's land and can feasibly be removed. There is thus a reasonable and concrete basis for the corrective orders here.

It is also clear that the validity of an exercise of police power over land depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation.[17] For example, in *Penn Central*

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15. Appellants cite in support of this argument *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Whatever the merits of their argument, appellants' reliance on *Robinson* is misplaced. The Supreme Court declared in that case that a statute criminalizing the "status" of narcotics addiction was unconstitutional. The instant case does not involve a criminal statute, but rather involves the exercise of police power in a civil regulation, where there is no requirement of *actus reus* and *mens rea*.

16. Appellants assume that they have acted without "fault" and have not "caused" the pollution. In light of our disposition of this case, we need not consider this assumption.

17. We note that the imposition of vicarious liability is not an uncommon means of eliminating water pollution. See *Portland Pipe Line v. Environmental Improvement Commission*, 414 U.S. 1035,

Transportation Co. v. New York, supra, the New York City Landsmarks Preservation Commission designated Grand Central Station a "landmark" as part of the City's comprehensive program to preserve historic landmarks and districts. Such a designation meant that the terminal owner was required to maintain the exterior architecture of the terminal in good repair, that the terminal facade could not be altered without approval of the Commission, and that the terminal's economic potential could not be fully developed by the construction of an office building atop the terminal. The Supreme Court held the City's landmark designation to be constitutional. It is clear from the facts in *Penn Central* that the terminal owner was in no way responsible for causing the terminal's landmark status: the owner did not "cause" the condition, nor can he be viewed as being "at fault." The Supreme Court disregarded the owner's lack of responsibility, however, and found the City's action constitutional.

Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) also illustrates that a property holder's

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NOTE 17 — *(Continued)*

94 S.Ct. 532, 38 L.Ed.2d 326, *dismissing appeal for want of a substantial federal question*, 307 A.2d 1 (Me. 1973) (state statute imposing vicarious liability upon oil terminal operators for oil spills caused by independent carriers who were destined for the operators' terminals, but over whom the operators had no control, held to be valid exercise of police power); *United States v. Marathon Pipe Line Co.*, 589 F2d. 1305 (7th Cir. 1978) (Coast Guard constitutionally imposed liability under Federal Water Pollution Control Act §311(b)(6) upon pipeline owner for pipeline rupture and oil spill caused by third party); United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978) (imposition of civil penalty upon barge owner under Federal Water Pollution Control Act §311(b)(6) for oil spill resulting from puncture of barge hull caused by third party held valid); *Gulf Oil Corp. v. United States*, 573 F.2d 1303 (3rd Cir. 1978), *affirming mem. United States v. Atlantic Richfield*, 429 F.Supp. 830 (E.D. Pa. 1977) (Section 311(b)(6) of Federal Water Pollution Control Act constitutionally imposes civil penalty upon oil spiller without regard to fault.

responsibility for the condition to be regulated is not an important factor in assessing the validity of the regulation. In that case a state agency pursuant to statute ordered property owners to cut down a large number of ornamental red cedar trees growing on their property because the trees produced cedar rust fatal to apple trees cultivated on adjacent land. Though the statute permitted the owners to use the felled trees and recover the costs of removing the trees, it did not provide compensation for the value of the trees or the diminished value of the property. The Court nonetheless found the statute constitutional, holding that a state could properly make "a choice between the preservation of one class of property and that of the other." Id. at 279, 48 S.Ct. at 247. Since the apple industry was important to the state, the Court concluded that the state had not acted unconstitutionally "by deciding upon the destruction of one class of property [without compensation] in order to save another, which, in the judgment of the legislature, is of greater value to the public." Id. The facts in Miller suggest that the property holders could not have caused the infection of their red cedar trees. The holding and discussion in *Miller* reflect the Court's conviction that such a consideration is of little import.[18] See also *Goldblatt v. Hempstead*, supra; *Euclid v. Ambler Realty*

18. It is appropriate that a property holder's responsibility has little significance in determining the validity of the state regulation. In criminal law, of course, inquiry into a defendant's "culpability" is at the core of guilt determination and punishment. In the field of tort law, the notion of "fault" is not an inappropriate limitation on liability because, among other reasons, the beneficiary of tort compensation, like the tortfeasor, is a private party. The notion of fault is least functional, however, when balancing the interests of a property holder against the interests of a state in the exercise of its police power, because the beneficiary is not an individual but the community. As this Court stated in an analogous setting: "The absence of facts supporting concepts of negligence, forseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance." *Barnes & Tucker I*, supra at 414, 319 A.2d at 883.

Co., supra; *Hadacheck v. Sebastian*, supra. In light of *Penn Central*, *Miller*, and the other cases cited, appellants have failed to persuade us that the Commonwealth has unconstitutionally exercised its police power.[19]

Orders of the Commonwealth Court at Nos. 66 and 67 January Term, 1979 are affirmed. Commonwealth's appeals from Commonwealth Court's orders at No. 68 January Term, 1979 are dismissed.

Mr. Justice NIX did not participate in the consideration or decision of this case.

Mr. Justice FLAHERTY filed a concurring opinion.

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19. We note our agreement with the Commonwealth Court's rejection of appellants' additional claims that the feasibility of abatement was not sufficiently proven, that the abatement orders are unconstitutional ex post facto laws, that DER's enforcement of Section 316 violates the Equal Protection Clause, and that a provision of Section 316 not in issue here violates the Equal Protection Clause.

[J-409]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NATIONAL WOOD PRESERVERS, INC., CLIFFORD ROGERS AND VIRGINIA ROGERS, *Appellants*	Nos. 66 & 67 January Term, 1979
v.	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES *Appellant*	No. 68 January Term, 1979
v.	
SHELL OIL COMPANY, PHILADELPHIA CHEWING GUM COMPANY	

Appeals from orders of the Commonwealth Court of Pennsylvania, dated May 24, 1978, Docket Nos. 1389, 1390, 1395 and 1415 C.D. 1976, affirming in part and reversing in part the orders of Commonwealth of Pennsylvania Environmental Hearing Board dated July 30, 1976, at Docket Nos. 73-253-D, 73-249-D, 73-256-D, 73-346-D.

CONCURRING OPINION

MR. JUSTICE FLAHERTY

At issue is the constitutionality of a portion of Section 316 of The Clean Streams Law, Act of July 31, 1970, P.L. 653, §12, amending 35 P.S. §691.316, which provides:

> "Whenever the [Department of Environmental Resources] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the [Department] may order the landowner or occupier to correct the condition in a manner satisfactory to the [Department]. . . ."

A reading of the majority opinion might lead to the belief that we adopt the strict liability construction of Section 316 which would compel the expenditure of financial sums by an owner or occupancy of land *based on no other factor* but the ownership or occupancy of the land. The learned late Judge Bowman, writing the opinion for the court below well set forth the law regarding this issue, and I quote that portion of the opinion:

> "The police power of this Commonwealth may not be used to require a landowner 'to abate a public nuisance existing on his land where such ownership is unrelated to the forces or conditions resulting in a public nuisance.' *Commonwealth v. Barnes & Tucker Co.*, 23 Pa. Commonwealth Ct. 496, 509, 353 A.2d 471, 478 (1976), aff'd 472 Pa. 115, 371 A.2d 461 (1977); *Commonwealth v. Wyeth Laboratories*, 12 Pa. Commonwealth Ct. 227, 315 A.2d 648 (1974). The police power of the Commonwealth may be brought to bear upon a landowner, however, at least under the theory of common law public nuisance, notwithstanding '[t]he absence of facts sup-

porting concepts of negligence, foreseeability or unlawful conduct.' *Barnes & Tucker I*, supra at 414, 319 A.2d at 883.

Applying these legal principles to the facts of this case, we believe that requiring these appellants to spend the financial sums necessary to abate this condition, *based solely upon their ownership or occupancy of land*, would be to employ means unduly oppressive upon these individuals. We believe that such an exercise of police power would transcend 'the parameters of reason'. *We believe that EHB's conclusion that Section 316 is a declaration of the strict liability of these appellants to correct the condition is erroneous as a matter of law because such a construction of Section 316 would permit the Commonwealth to engage in regulation which constitutes the taking of property without compensation, and hence, would be an unconstitutional exerise of police power.* (emphasis supplied)

It is the duty of a court, when faced with a construction of a statute involving serious constitutional difficulties, to reject that interpretation in favor of another construction which will save its constitutionality. 2A J. Sutherland, Statutes and Statutory Construction §45.11 (4th ed. C. Sands 1973). 'Where a statute can be given two constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be invoked. Dolan v. Linton's Lunch, 397 Pa. 114, 152 A.2d 887 (1959); Evans v. West Norriton Two, Municipal Authority, 370 Pa. 150, 87 A.2d 474 (1952); Fidelity Philadelphia Trust Co. v. Hines, 337 Pa. 48, 10 A.2d 553 (1940).' *Pittsburgh Coal Co. v. Sanitary Water Board*, 4 Pa. Commonwealth Ct. 407, 424-25, 286 A.2d 459, 468 (1972), rev'd on other grounds, 452 Pa. 77, 306 A.2d 308 (1973). See also *Commonwealth v. MacDonald, supra* [464 Pa. 435] at 447, 347 A.2d [290] at 297.

We believe that there is a construction of Section 316 which both comports with the law of public nuisance and renders that section constitutional as applied to the factual situation present in this case. Where the polluting condition is created by the conduct of an individual other than the owner or occupier, the owner or occupier of the land on which the condition exists cannot be liable to take corrective measures under Section 316 on the basis of the bare fact of ownership or occupancy. Such an owner or occupier can be ordered to take corrective measures, however, if he permitted or authorized the creation on his land. Such an owner or occupier can also be ordered to take corrective measures if he (1) knows or should know of the existence of the condition on the land; and (2) associates himself in some positive respect, beyond mere ownership or occupancy, with the condition after its creation. The key to imposing liability under Section 316 upon an owner or occupier for the correction of a condition which he did not create is that such an owner or occupier, after knowing of the condition, engages in some affirmative conduct indicating his adoption of the condition. Essentially, this theory of liability for owners or occupiers who do not create the condition is an application to Section 316 of the common law liability of owners or occupiers who "continue" or "adopt" a nuisance not created by them. See 66 C.J.S. *Nuisances* §§83-89 (1950); 58 AM. JUR. 2d *Nuisances* §§48-56 (1971).

It has always been recognized that the "right" of property ownership carries with it a concurrent "obligation" which is inherent in the basic relationship of an "owner" of property to society. These "obligations, however, have always related to the *use* one puts to property, not mere ownership. The ancient maxium of the common law is, "Sic utere tuo ut alienum non lae dus", 9

Coke 59 — So *use* your own property as not to injure your neighbor. Where society requires, the property of another can be *taken*, but only with due compensation. To construe the Subject Act as providing for strict liability, based on nothing more than the ownership or occupation of land, would be to impose on innocent individuals the burden which should be born by society as a whole, thus, an unconstitutional taking.

I, thus, concur only in the result.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA CHEWING GUM CORPORATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

No. 1389
C.D. 1976

SHELL OIL COMPANY,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES AND TOWNSHIP OF HAVERFORD,
Respondents

No. 1390
C.D. 1976

NATIONAL WOOD PRESERVERS, INC.,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

No. 1395
C.D. 1976

CLIFFORD ROGERS AND VIRGINIA ROGERS,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

No. 1415
C.D. 1976

Before: HONORABLE JAMES S. BOWMAN *President Judge*, HONORABLE JAMES C. CRUMLISH, JR., *Judge*, HONORABLE ROY WILKINSON, JR., *Judge*, HONORABLE THEODORE O. ROGERS, *Judge*, HONORABLE GENEVIEVE BLATT, *Judge*

Argued: October 4, 1977

OPINION BY PRESIDENT JUDGE BOWMAN

Filed May 24, 1978

At the heart of these consolidated appeals is the following fundamental question: Under what circumstances may the Commonwealth order a landowner or an occupier of land to correct a condition existing on his land which is causing pollution of Commonwealth waters, where such polluting condition was created by the conduct of someone other than the owner or occupier? It is before us by way of an adjudication and order of the Environmental Hearing Board (EHB) which sustained in part and dismissed in part the appeals of Philadelphia Chewing Gum Corporation (Gum), Shell Oil Company (Shell), National Wood Preservers, Inc. (Wood), and Clifford A. and Virginia M. Rogers (Rogers) from orders issued by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER). These four appellants had been ordered, pursuant to Section 316 of The Clean Streams Law,[1] to take corrective measures with regard to what DER determined was a "condition" existing on land either owned or occupied by them. Since our disposition of these appeals is, in part, determined by the differing relationships each appellant has to the condition involved, we shall first examine the factual postures of these appellants vis-a-vis the land, the

1. Act of June 22, 1937, P.L. 1987, *as amended*, added by Section 5 of the Act of August 23, 1965, P.L. 372, *as amended*, 35 P.S. §691.316.

waters and the existing condition. We shall next discuss the construction and applicability of Section 316 of The Clean Streams Law in situations where the landowner or occupier did not create the condition which is resulting in pollution. Finally, we shall review the constitutional challenges raised to Section 316.

THE LAND

The land involved here is located in Haverford Township, Delaware County, in the area of the intersection of Eagle Road and the Penn Central railroad line. Appellants Rogers and Gum have owned parcels of land in this area since the 1940's. Rogers' property is located on the northwest side of Eagle Road, Gum's property on the southeast side of Eagle Road, across from Rogers' land. The entire Rogers' tract is leased, in part to Wood and in part to Shell. Gum's production plant has been operating on its tract since 1947.

On January 10, 1947, Rogers leased the entirety of their tract to Samuel J. Jacoby (Jacoby) and C. David Jacobs (Jacobs), individuals not parties to the instant proceedings.[2] On January 24, 1947, Jacoby and Jacobs assigned said lease to Wood, a corporation at that time controlled by Jacoby. From March 28, 1947 until July, 1963, Jacoby conducted a wood preservative business on this premises. On July 30, 1963, Jacoby sold his entire interest in Wood to the Goldstein family (Goldstein). At this time also, Goldstein took assignment of the lease of the property on which Wood was located. Thereafter, Wood has continued to operate as a wood preservative business, under Goldstein's ownership and control.

On February 10, 1967, Wood, under Goldstein, released a portion of the above parcel from its leasehold.

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2. A petition to join Jacoby as an additional defendant was filed by Shell in October, 1973. However, EHB denied said petition. *See In re National Wood Preservers*, 64 Pa. D. & C.2d 78 (1974).

On that same date, Rogers leased said portion of the parcel to Shell. Shell subsequently built and, at all relevant times thereafter, has operated and maintained a gasoline station on this leased land.

THE WATERS

The waters of the Commonwealth involved here are the groundwater and certain surface waters in the geographical area discussed above. The pollutant involved is pentachlorophenol mixed with oil which EHB found was "present in the ground water and in Naylors Run, both of which constitute 'waters of the Commonwealth.' " *See* Section 1 of The Clean Streams Law, 35 P.S. §691.1, wherein "Waters of the Commonwealth" is defined.

Naylors Run is a stream which has its source at a point northwest of the land owned by Rogers and leased to Wood and Shell. Naylors Run flows in a general southerly direction along a course which is northeast and east of the Rogers tract. The stream flows southeasterly under Eagle Road via a culvert and continues to flow in a generally southeasterly direction along a course east of the Gum tract.

Pentachlorophenol mixed with oil is present in the groundwater under the surface of appellants' land. EHB found that the pollutant is discharged into Naylors Run in the following manner:

> "Pentachlorophenol mixed with oil flows, mostly on top of the water table, under the surface of the property of Rogers' and leased, in part to Shell and in part to Wood. This material then flows in a southwesterly direction under Eagle Road. . . . Pentachlorophenol mixed with oil flows, mostly on top of the water table, under the surface of the property of Gum. This material then infiltrates the storm

> sewer pipe which is maintained by the Township . . . at points between manhole No. 8 and manhole No. 9. Pentachlorophenol mixed with oil travels in this storm sewer pipe and is discharged to Naylors Run at the terminus of this pipe."

Although EHB found that "it appears that the major amount of pentachlorophenol mixed with oil is pooled under the surface of the property of Rogers' and leased, in part to Shell and in part to Wood," neither the total volume nor the precise dispersion of the pollutant is presently known. Indeed, one of the directives contained in the EHB order which is the subject of the instant appeals requires appellants to perform further well drilling and samplings of the area's groundwater in order to determine more definitely the scope of the pollution problem.

THE CONDITION

In its adjudication, EHB concluded that the "condition" which is present in this case is "the presence of pentachlorophenol mixed with oil" under the surface of appellants' land. EHB found as fact, however, that neither Wood, under the ownership of the Goldstein family, nor Shell, nor Gum had "discharged or permitted the discharge of industrial waste to the waters of the Commonwealth." The questions arise, therefore, as to how and when this "condition" came into existence. We begin with EHB's finding that "[p]entachlorophenol is a solid organic material which is acidic in nature. It is a fungicide, a herbicide and *a wood preservative*." (Emphasis added). EHB found that Wood, during its years under Jacoby, utilized pentachlorophenol in the operation of its wood preservative business. As stated by EHB:

> "During the course of the operation of this business, under Jacoby's ownership, waste liquids were discharged or permitted to be discharged from the sur-

> face of the land upon which said business was conducted to the ground water via a well on said premises. The Health Officer of the Township and representatives from the Pennsylvania Department of Health, the predecessor in duties to D.E.R., took enforcement action against Jacoby and/or against said corporation by reason of the discharges of these waste liquids to the ground water."

At one point in the "Discussion" section of its adjudication, EHB characterizes Jacoby as the individual "who was responsible for the creation of the condition. . . ."

The record contains ample evidence all of which seems to lead inescapably to the conclusion that Jacoby's conduct created this condition. Complaints by area residents to township health officials about discoloration of Naylors Run by an oily brownish substance first began prior to 1956. Jacoby was contacted by both township and state officials regarding these complaints. There is testimony in the record which indicates that Jacoby discontinued the use of the disposal well in 1956. Given the specific findings of fact that neither Wood, under Goldstein, nor Gum nor Shell has discharged any industrial waste into Commonwealth waters, we must conclude that the presence of pentachlorophenol under the land of these appellants is a direct result of Jacoby's activities prior to and including the year 1956. Given EHB's findings of fact pertaining to the subsurface divides and groundwater flow in this area, it appears that Gum "acquired" the presence of pentachlorophenol under its land due to the downward slope of the subsurface water table from the site of the disposal well.

Thus, the "condition" which EHB has ordered these appellants to correct was created by conduct which appears to have ceased over two decades ago. While the conduct has ended, the condition lingers on. Moreover, the very conduct resulting in the condition's creation was not performed by any of these appellants.

THE APPLICABILITY OF SECTION 316 TO NONMINING ACTIVITIES

Before discussing the proper application of Section 316 to situations where the conduct of an individual other than the owner or occupier created the condition causing pollution, we shall address the applicability of this section to nonmining activities.

During the proceedings below, it was stipulated by each of the parties that the sole authority for the issuance of the orders by DER was Section 316 of The Clean Streams Law. On appeal to this Court, each appellant has argued that Section 316 applies only to pollution resulting from mining operations — specifically, to acid mine drainage. We are of the view, however, that Section 316 is applicable to the type of pollution and condition present here.

The general legislative history of The Clean Streams Law has been examined by this Court and by the Supreme Court on several occasions, and need not be recounted extensively here. *See Commonwealth v. Barnes & Tucker Co. (Barnes & Tucker I)*, 455 Pa. 392, 395-400, 319 A.2d 871, 873-76 (1974); *Commonwealth v. Harmar Coal Co. (Harmar Coal)*, 452 Pa. 77, 83-86, 306 A.2d 308, 31213 (1973); *Commonwealth v. Barnes & Tucker Co.*, 9 Pa. Commonwealth Ct. 1, 24-46, 303 A.2d 544, 55566 (1973), *rev'd, Barnes v. Tucker I, supra*. Originally enacted in 1937, The Clean Streams Law thrice has been significantly amended, first in 1945, then in 1965, and again in 1970.[3] Section 316 was added as part of the 1965 amendments.

As enacted in 1965, Section 316 provided the following:

> "Whenever the Sanitary Water Board finds that pollution of waters of the Commonwealth is result-

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3. The Clean Streams Law was also amended in 1956 when Section 314, 35 P.S. §691.314, was added.

> ing from a condition which exists on land in the Commonwealth and that the owner or occupier of such land has refused to allow a mine operator or other person or an appropriate agency of the Commonwealth access to the land to take whatever measures are necessary to eliminate the pollution, the board may order the landowner or occupier to allow such access."

Appellants argue that the 1965 amendments to The Clean Streams Law were for the purpose of extending the scope of the statute to pollution resulting from mining activities, a type of pollution theretofore given "special" status under The Clean Streams Law. *See* Section 2 of the Act of August 23, 1965, P.L. 372. Moreover, it is argued that since Section 316 was added concurrent to the addition of Section 315, 35 P.S. §691.315, a section which indisputably applies to mining operations, Section 316 similarly was intended to be limited in applicability to conditions created by mining activities.

Although the 1965 amendments to The Clean Streams Law do appear to have been directed mainly to problems arising from mine drainage, we believe that the legislative changes made to The Clean Streams Law by the 1970 amendments to this statute made the section applicable to the instant condition and pollution. Our Supreme Court has commented upon the 1970 amendments to Section 316:

> "Section 316, which had been added in 1965 to require landowners and occupiers to allow access to the land so that appropriate corrective measures could be taken, was *significantly changed* [in 1970]. That section now provides a separate basis for the imposition of liability for pollution 'from a condition which exists on the land.' " *Barnes & Tucker I, supra* at 400, 319 A.2d at 876 (emphasis added).

As amended in 1970, Section 316 presently provides, in pertinent part:

> "Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, 'landowner' includes any person holding title to or having a proprietary interest in either surface or subsurface rights."[4]

Several points must be noted with regard to the 1970 amendments to The Clean Streams Law generally, and Section 316 particularly.

Section 4 of The Clean Streams Law, presently entitled "Declaration of Policy" and added in 1965, was amended in 1970 to delete the specific references to mine drainage which had originally been contained therein. *See and compare* Section 2 of the Act of August 23, 1965, P.L. 372 with Section 3 of the Act of July 31, 1970, P.L. 653. We view the legislature's deletion of specific references to mine drainage in Section 4 of The Clean Streams Law in 1970 as an indication that the legislative declaration of policy underlying The Clean Streams Law was being correspondingly broadened.

With specific reference to Section 316, it must be observed first, that the 1965 version provided that the Board could only order a landowner or occupier *to allow access* to the land on which a polluting condition was found to exist. In 1970, the provisions of Section 316

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4. The Sanitary Water Board was abolished and its functions transferred to the Department of Environmental Resources by Section 30(a) of the Act of December 3, 1970, P.L. 834.

were fundamentally altered. DER is now empowered to order a landowner or occupier *to correct* the polluting condition. No longer is this section a mere key to the door; it is a framework itself through which pollution of Commonwealth waters can be combatted.

A second significant change which altered the scope of Section 316 in 1970 was the addition of the words "or a danger of pollution". While previously the Board could act only after pollution was found to exist, action can now be taken at an earlier stage when the *danger* of pollution becomes apparent.

Thus, we believe that the 1970 amendments to Section 316 make that section applicable not only to conditions arising from mine drainage, but, more broadly, to the type of condition causing pollution in this case.

THE APPLICATION OF SECTION 316 TO LANDOWNERS OR OCCUPIERS WHO DID NOT CREATE THE POLLUTING CONDITION

EHB applied the provisions of Section 316 to appellants utilizing the following reasoning:

> "We have found that pollution is resulting from a condition which exists on land which is owned and/or occupied by Appellants.
>
> "This finding, standing alone, imposes upon these Appellants the responsibility to correct such condition, notwithstanding the fact that this condition was neither created nor actively maintained by any of them.
>
> "As applied to these Appellants, Section 316 is a declaration of their strict liability to correct a condition based upon the mere fact that they own and/or occupy the land under which this condition exists."

Since we believe that serious constitutional problems arise if the police power of this Commonwealth can be

wielded against landowners or occupiers whose ownership or occupancy bears absolutely no relationship to the polluting condition, we hold that EHB committed an error of law in concluding that Section 316 is a declaration of strict liability based upon the mere fact of ownership or occupancy.

In enacting The Clean Streams Law in 1937, the legislature gave statutory expression to an inherent police power of the Commonwealth. "The police power is the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare." *Commonwealth v. Barnes & Tucker Co. (Barnes & Tucker II)*, 472 Pa. 115, 123, 371 A.2d 461, 465 (1977). Nearly thirty years prior to the passage of The Clean Streams Law, our Supreme Court, adopting the language of our Superior Court, stated the following with regard to the police power of the Commonwealth:

> "That power undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety, of society. . . . That the preservation of the waters of the state from pollution, involving danger to health, is a proper subject for the exercise of the police power, cannot be seriously questioned." *Commonwealth v. Emmers*, 221 Pa. 298, 306, 70 A. 762, 766 (1908).

More recently, in a case involving Section 315 of The Clean Streams Law, the Supreme Court stated:

> "A State in the exercise of its police power may, within constitutional limitations, not only suppress what is offensive, disorderly or unsanitary, but enact regulations to promote the public health, morals or safety and the general well-being of the community. Bacon v. Walker, 204 U.S. 311 (1907). This power has been used to prevent industrial practices in the use of private property which were injurious to the public. The Slaughter House Cases, 83 U.S.

36 (1872). The police power may even be exercised over property and current business operations, requiring the destruction of existing property, Miller v. Schoene, 276 U.S. 272 (1928), or the imposition of new costs, Queenside Hills Realth Co., Inc. v. Saxl, 328 U.S. 80 (1946); The Slaughter House Cases, 83 U.S. 36 (1872). Regulations maintaining the State's water resources have also been held to be within the scope of the police power. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908); Commonwealth v. Emmers, 33 Pa. Superior Ct. 151 (1907), aff'd, 221 Pa. 298, 70 A. 762 (1908)." *Harmar Coal, supra* at 92, .306 A.2d at 316-17.

It has been stated that "[t]he police power of the state is as comprehensive as the demands of society require under the circumstances." *Barnes & Tucker II, supra* at 127, 371 A.2d at 467. Yet, while the scope of the police power is extensive, it is not infinite. There exist certain constitutional standards by which the State's exercise of police power must be measured. Our Supreme Court has deemed "instructive" the standard enunciated by the United States Supreme Court in *Lawton v. Steele*, 152 U.S. 133 (1894):

> " 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Id. at 137." *Barnes & Tucker I, supra* at 418, 319 A.2d at 885.

"In applying these standards a regulation must be measured by its 'reasonableness,' *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)." *Harmar Coal, supra* at 93, 306 A.2d at 317. "The exercise of the police power

is . . . restricted by the parameters of reason." *Barnes & Tucker I, supra* at 419, 319 A.2d at 886.

"Reasonableness" as a standard by which to measure the exercise of police power is not a concept capable of neat definition. In the case of *Hudson County Water Co. v. McCarter*, 209 U.S. 359, 355 (1908), Mr. Justice Oliver Wendell Holmes stated:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

Our Supreme Court has recognized that "[t]here is often a thin line separating that which constitutes a valid exercise of the police power and that which constitutes a taking." *Barnes & Tucker I, supra* at 418, 319 A.2d at 885. It is clear, however, that an exercise of police power becomes unreasonable if the regulations imposed by the state become so onerous as to constitute a taking of prop-

erty which constitutionally requires compensation. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

The police power of this Commonwealth may not be used to require a landowner "to abate a public nuisance existing on his land where such ownership is unrelated to the forces or conditions resulting in a public nuisance." *Commonwealth v. Barnes & Tucker Co.*, 23 Pa. Commonwealth Ct. 496, 509, 353 A.2d 471, 478 (1976), *aff'd* 472 Pa. 115, 371 A.2d 461 (1977); *Commonwealth v. Wyeth Laboratories*, 12 Pa. Commonwealth Ct. 227, 315 A.2d 648 (1974).[5] The police power of the Commonwealth *may* be brought to bear upon a landowner, however, at least under the theory of common law public nuisance, notwithstanding "[t]he absence of facts supporting concepts of negligence, foreseeability or unlawful conduct." *Barnes & Tucker I, supra* at 414, 319 A.2d at 883.

Applying these legal principles to the fact of this case, we believe that requiring these appellants to spend the financial sums necessary to abate this condition, *based solely upon their ownership or occupancy of land*, would be to employ means unduly oppressive upon these individuals. We believe that such an exercise of

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5. We recognize that no express language appears in Section 316 which declares a "condition" resulting in pollution to be a public nuisance. We recognize further that other sections of The Clean Streams Law do expressly declare certain activities to be public nuisances. Present in this case, however, and that process which DER seeks to have stopped, is the discharge of this pollutant into Naylors Run. Section 3 of The Clean Streams Law, 35 P.S. §691.3, expressly declares such a discharge to be a public nuisance. Thus, we deem it proper to apply public nuisance law to this factual situation where the condition is the direct cause of a public nuisance. Moreover, the Supreme Court has stated that "[a] thing may be a public nuisance because it is so declared by statute, either explicitly or implicitly."

Commonwealth v. MacDonald, 464 Pa. 435, 458, 347 A.2d 290, 303 (1975) (footnotes omitted). We believe that the condition here constitutes an implicitly declared statutory public nuisance.

police power would transcend "the parameters of reason". We believe that EHB's conclusion that Section 316 is a declaration of the strict liability of these appellants to correct the condition is erroneous as a matter of law because such a construction of Section 316 would permit the Commonwealth to engage in regulation which constitutes the taking of property without compensation, and hence, would be an unconstitutional exercise of police power.

It is the duty of a court, when faced with a construction of a statute involving serious constitutional difficulties, to reject that interpretation in favor of another construction which will save its constitutionality. 2A J. Sutherland, Statutes and Statutory Construction §45.11 (4th ed. C. Sands 1973). "Where a statute can be given two constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be invoked. Dolan v. Linton's Lunch, 397 Pa. 114, 152 A.2d 887 (1959); Evans v. West Norriton Twp. Municipal Authority, 370 Pa. 150, 87 A.2d 474 (1952); Fidelity Philadelphia Trust Co. v. Hines, 337 Pa. 48, 10 A.2d 553 (1940)." *Pittsburg Coal Co. v. Sanitary Water Board*, 4 Pa. Commonwealth Ct. 407, 424-25, 286 A.2d 459, 468 (1972); *rev'd on other grounds*, 452 Pa. 77, 306 A.2d 308 (1973). *See also Commonwealth v. MacDonald*, *supra* at 447, 347 A.2d at 297.

We believe that there is a construction of Section 316 which both comports with the law of public nuisance and renders that section constitutional as applied to the factual situation present in this case.[6] Where the

6. We are mindful of the Supreme Court's pronouncement that "[t]he remedies provides in Section 316 are statutorily created, and as such are to be strictly construed." *Barnes & Tucker I*, *supra at* 407, 319 A.2d at 880. It is clear, however, from the context of the above quotation, that the Court was addressing the point that *administrative procedures* must be strictly followed by DER before the remedies provided in Section 316 can be utilized. We do not believe that the Court intended to suggest that the substantive provisions of Section 316 could not be subjected to judicial construction.

polluting condition is created by the conduct of an individual other than the owner or occupier, the owner or occupier of the land on which the condition exists cannot be liable to take corrective measures under Section 316 on the basis of the bare fact of ownership or occupancy. Such an owner or occupier can be ordered to take corrective measures, however, if he permitted or authorized the creation of the condition on his land. Such an owner or occupier can also be ordered to take corrective measures if he (1) knows or should know of the existence of the condition on the land; and (2) associates himself in some positive respect, beyond mere ownership or occupancy, with the condition after its creation. The key to imposing liability under Section 316 upon an owner or occupier for the correction of a condition which he did not create is that such an owner or occupier, after knowing of the condition, engages in some affirmative conduct indicating his adoption of the condition. Essentially, this theory of liability for owners or occupiers who do not create the condition is an application to Section 316 of the common law liability of owners or occupiers who "continue" or "adopt" a nuisance not created by them. *See* 66 C.J.S. *Nuisances* §§83-89 (1950); 58 AM. JUR. 2d *Nuisances* §§48-56 (1971).

We turn now to applying the above construction of Section 316 to appellants in this case.

With respect to Gum, we sustain its appeal on the ground that EHB improperly applied Section 316 to it. There is no evidence in the record to indicate that Gum knew of the existence of this condition prior to the institution of these proceedings. Nor is there any reason why Gum, as a landowner adjacent to the land on which the condition was created, ought to have become aware of the presence of pentachlorophenol mixed with oil under its land. Finally, Gum has never engaged in any affirmative conduct which can possibly be viewed as indicating an association with or its adoption of the condition.

With respect to Shell, there is testimony in the record that a Shell representative, prior to entering into the lease with Rogers, was shown the disposal well used by Wood and informed of the past practice of disposing of chemicals into the well. While this testimony tends to establish that Shell possessed knowledge of the underlying pollution problem at the time it became an occupant, we find no evidence that Shell has ever engaged in any affirmative conduct indicating an association with or adoption of the condition. We, therefore, sustain Shell's appeal on the basis that EHB improperly applied Section 316 to it.

With respect to Wood, an examination of the record indicates that its present management, Goldstein, was wary of pollution problems connected with Jacoby's operation of the wood preservative business prior to entering into its agreement to purchase the company in 1963. Approximately one month prior to purchasing Jacoby's stock on July 30, 1963, Harris Goldstein went to the business premises and remained there continuously for that month in order to determine whether to buy the business. He observed that the equipment used by Jacoby was in poor condition; that the entire operation was being conducted on dirt and not on concrete floors; that oil was being spilled on the ground and that chemicals were improperly stored. Goldstein specifically inquired of Jacoby regarding the existence of any pollution problems and was assured that, although there had been a pollution problem previously, the problem had been remedied. Consequently, Goldstein insisted that the following clause be included in the July 30, 1963 stock purchase agreement: "Jacoby represents and warrants that...there is no litigation pending or threatened against National Wood, and there are no administrative proceedings pending or threatened against it by any agency or instrumentality of the federal, state or local governments, except for a charge of stream pollution since cured. . . ."

On September 17, 1963, Jacoby was arrested by the Pennsylvania State Police for polluting. As a result of Jacoby's arrest, Goldstein consulted their attorney about attempting to force Jacoby to buy back the stock of the business. However, Goldstein decided to keep the business and to attempt to take measures to correct the pollution problem. Some measures were in fact taken in 1964, with the approval of the Pennsylvania Sanitary Water Board. On December 31, 1964, Goldstein and Jacoby entered into an agreement whereby Jacoby agreed to give Goldstein a credit of $35,000 in reduction of the purchase price of the stock. One of the premises upon which said reduction was based was Goldstein's claim that Jacoby had breached the clause in the original purchase agreement regarding the absence of a stream pollution problem. As part of the December 31, 1964 agreement also, Goldstein released Jacoby from the warranty in the original agreement that the pollution problem had been cured.

We are of the opinion that the sequence of events set forth above establishes clearly that Goldstein, after knowing of the existence of the condition causing pollution, engaged in affirmative conduct which indicates an adoption of the condition. While Goldstein's cooperation with the Sanitary Water Board in 1964 is commendable, the fact remains that Goldstein, because of the pollution problem, considered and then decided against divesting themselves of the business. After deciding to keep the business, Goldstein was able to get a reduction in its purchase price, in part because of the pollution problem. Since Wood's present management knew of the existence of the condition and engaged in affirmative conduct to associate themselves with it, we hold that it was proper for EHB to conclude that Section 316 applies to Wood.

With respect to Rogers, we hold that Section 316 is applicable to them as well. Rogers have owned their tract since the 1940's and constantly have had industrial

and business tenants on their land. While the record presently before us does not reveal when, or even if, Rogers came to have knowledge of the pollution problem created by one of their tenants, we believe that Rogers should have known of the existence of this condition on their land. Rogers, as owners, have suffered this condition to continue for over twenty years. They have collected rent from Wood for over thirty years, first from Jacoby, the creator of the condition, and subsequently from Goldstein. Thus, we believe that Rogers, over the course of twenty years, have sufficiently associated themselves with the existence of this condition to render reasonable their participation in its abatement.

ADDITIONAL CONSTITIONAL CHALLENGES

Since we sustain the appeals of Gum and Shell on the ground that EHB improperly applied the provisions of Section 316 to them, we need not address the additional constitutional challenges to that section which they have raised. However, Wood and Rogers have raised several constitutional challenges to Section 316 to which we shall now turn.

Both Wood and Rogers have argued that Section 316 is an unconstitutional violation of due process in that it imposes liability for abatement based upon the mere "status" of landowner or occupier, rather than upon conduct. In light of our above discussion of the proper construction of Section 316, we dismiss these arguments as without merit.

Both Wood and Rogers have argued that DER has violated their right to equal protection because DER has engaged in intentional and purposeful discrimination in the enforcement of Section 316. While it may be true that there are other landowners and occupiers in the

area in question under whose land pentachlorphenol mixed with oil is present, but against whom DER chose not to proceed, we do not believe that this conduct constitutes unconstitutional discriminatory enforcement. "Proof of mere laxity of enforcement by the authorities is not sufficient to establish an impermissible exercise of discrimination in the enforcement of the law." *The Kroger Co. v. O'Hara Township*, 243 Pa. Superior Ct. 479, 482, 366 A.2d 254, 256 (1976).

Wood and Rogers argue that EHB's order should be reversed because EHB failed to apply the rule on the burden of proving abatement feasibility enunciated by this Court in *Commonwealth v. Wyeth Laboratories, supra.* In *Wyeth*, a case arising under Section 401 of The Clean Streams Law, 35 P.S. §691.401, we stated that where "the power and resources of the Commonwealth are being brought to bear upon one not affirmatively polluting the environment and *blameless with respect to the conditions producing the pollution* and *simply because of its ownership of the land* alleged to be the source of the pollution" the burden of proving the feasibility of abatement should fall on the Commonwealth. *Wyeth, supra* at 240, 315 A.2d at 655 (emphasis added). As we have stated above, we do not believe that either Wood or Rogers is "blameless" with respect to this condition. More circumstances than mere ownership or occupancy are present here which justify EHB's order directing Wood and Rogers to embark upon an abatement program.

Wood contends that Section 316 is unconstitutional because it constitutes ex post facto legislation. The argument essentially is that Jacoby discharged the pollutant sometime prior to 1963 and Section 316 was not enacted until 1965. We reject this argument because it is the *present condition* of the land which Wood has been ordered to correct. Although the seeds culminating in this

condition may have been sewn a number of years ago, the condition itself still persists.

We have considered the remaining arguments raised by Wood and find them to be without merit.

Consistent with the foregoing, we issue an Order.

/s/_____
James S. Bowman,
President Judge

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA CHEWING GUM CORPORATION — No. 1389 C.D. 1976,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

Respondent

SHELL OIL COMPANY, — No. 1390 C.D. 1976

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and TOWNSHIP OF HAVERFORD

Respondents

NATIONAL WOOD PRESERVERS, INC., — No. 1395 C.D. 1976

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

Respondent

CLIFFORD ROGERS and VIRGINIA ROGERS,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, — No. 1415 C.D. 1976

Respondent

ORDER

NOW, May 24, 1978, the appeals of Philadelphia Chewing Gum Corporation and Shell Oil Company from the adjudication and order of the Environmental Hearing Board dated July 30, 1976, are hereby sustained, and said order, as pertains to said petitioners is hereby reversed. The appeals of National Wood Preservers, Inc. and Clifford A. and Virginia M. Rogers from the adjudication and order of the Environmental Hearing Board dated July 30, 1976, are hereby denied, and said order, as pertains to said petitioners, is hereby affirmed.

James S. Bowman,
President Judge

COMMONWEALTH OF PENNSYLVANIA
Environmental Hearing Board
Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:	
Philadelphia Chewing Gum Company, National Wood Preservers, Shell Oil Company & Clifford and Virginia Rogers	DOCKET NO. 73-253-D 73-249-D 73-256-D 73-346-D
v.	
Commonwealth of Pennsylvania Department of Environmental Resources	

ADJUDICATION
By the Board: Issued, July 30, 1976.

This matter is before the Board on appeals filed by National Wood Preservers, Inc.[1] (Wood), Philadelphia Chewing Gum Corp.[2] (Gum), Shell Oil Company (Shell), and Clifford A. Rogers and Virginia M. Rogers, his wife (Rogers'), from Orders issued to each said Appellant by the Commonwealth of Pennsylvania Department of Environmental Resources (D.E.R.).

In the Orders to Wood, Gum and Shell, each of which were issued on July 12, 1973, D.E.R. made three findings, which are set forth as follows:

> "WHEREAS, a serious problem of contamination exists in the ground waters and surface waters in the area of the intersection of Eagle Road and Penn Central Railroad in Haverford Township,

1. D.E.R. described this Appellant as National Wood Preservers.

2. D.E.R. described this Appellant as Philadelphia Chewing Gum Company.

Delaware County, Pennsylvania, more specifically described as on the Lansdowne, Pennsylvania seven and one half minute topographic quadrangle, 1967, 9.5 inches west and 19.5 inches north of lower right hand corner; and

"WHEREAS, said contaminant consists of creosote containing pentachlorophenol. Said contaminant appears in both ground and surface water including waters of the Commonwealth locally known as Naylor's Run, a tributary of Cobbs Creek; and

"WHEREAS, said contaminant degrades the quality of the waters of the Commonwealth. Said contaminant is therefore subject to the sanctions of the Clean Streams Law of the Commonwealth of Pennsylvania."

By these Orders Wood, Gum and Shell were directed to take concerted action with each other to submit a proposal to D.E.R., by August 6, 1973, which was to include:

a. A definition of the specific geographical area of said creosote contamination.

b. A profile of the groundwater table in such geographical area.

c. Engineering plans to remove the contaminants from the groundwater and surface water to a degree which will restore the above mentioned waters to their natural quality.

Wood, Gum and Shell were also directed to provide to D.E.R., by August 27, 1973, a final proposal of engineering plans for elimination and removal of such contamination and for restoration of said waters which was acceptable to D.E.R. This final proposal was to include a time schedule for the implementation thereof.

Each of said Appellants filed timely appeals to this Board from these Orders. On or about September 7,

1973, said Appellants and D.E.R. stipulated to a supersedeas with regard to compliance therewith, pending our determination of the various appeals.

In the Order issued to Rogers', on September 21, 1973, D.E.R. made three findings, the language of which was somewhat different from the language contained in the Orders which were issued to Wood, Gum and Shell. These findings are set forth as follows:

> "WHEREAS, Clifford A. Rogers and Virginia M. Rogers, his wife, our (sic) certain land in the area of the intersection of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania, more specifically described as on the Lansdowne, Pennsylvania seven and one half minute topographic quadrangle, 1967, 9.5 inches west and 19.5 inches north of lower right hand corner, and
>
> "WHEREAS, the Department of Environmental Resources ("Department") of the Commonwealth of Pennsylvania ("Commonwealth") has found on the basis of its inspections, *inter alia*, September 26, 1972, August 21, 1973 and August 22, 1973, that a polluting substance containing pentachlorophenol fuel oil and creosote ("pollutant") is found in the groundwaters in the area, including the land owned by Clifford A. Rogers and Virginia M. Rogers, his wife; and leased to National Wood Preservers and Shell Oil Company, as well as the land owned by Philadelphia Chewing Gum; and in the surface waters, including Naylor's Run, a tributary to Cobb Creek ("waters"), and
>
> "WHEREAS, National Wood Preservers, Philadelphia Chewing Gum, and Shell Oil Company, by Orders dated July 12, 1973 ("Orders") were directed to take concerted action to remove the pollutants and restore to the waters to their natural water quality in accordance with the specific directives

contained in the Orders, appeals from which Orders have been taken to the Environmental Hearing Board by National Wood Preservers as Docket No. 73-249, Shell Oil Company as Docket No. 73-256, and Philadelphia Chewing Gum as Docket No. 73-213."

In this Order Rogers' were directed to, either individually or jointly with the other Appellants, submit a preliminary proposal, acceptable to D.E.R., by October 19, 1973, which was to include:

"(1) A definition of the specific geographical area in which the pollutant is found; and

"(2) A profile of the groundwater table in the area in which the pollutant is found; and

"(3) A proposal to remove the pollutant from the waters, restoring the waters to their natural quality."

Rogers' were also directed to provide to D.E.R., by November 9, 1973, a final proposal to remove said pollutant from said waters and to remove said waters to their natural quality which was acceptable to D.E.R. This final proposal was to include an acceptable time schedule for the implementation thereof.

Rogers' filed a timely appeal to this Board from this Order; on or about October 12, 1973, Rogers' and D.E.R. stipulated to a supersedeas with regard to compliance therewith, pending our determination of the appeal.

On or about October 15, 1973, Shell filed a petition wherein it sought to join Samuel Jacoby as an "additional defendant" in these proceedings.[3] By our Opinion and Order dated January 17, 1974, this petition was denied.

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3. Samuel Jacoby owned all of the stock issued by Wood until July 30, 1963. In the petition for joinder, it was alleged that if there was pollution of the waters of the Commonwealth in the relevant geographical area, Mr. Jacoby had caused it to occur.

On November 1, 1973, we entered an Order by which all appeals were consolidated for hearing.

On January 31, 1974, we entered an Order in which we granted the petition of the Township of Haverford (Township) to intervene.[4] The hearing on these consolidated appeals, before Louis R. Salamon, Esquire, Hearing Examiner, was held on the following dates: November 20, 21, 1974; January 13, 14, 15, 16, 17, 1975; June 23, 24, 25, 26, 27, 30, 1975.

During the course of the hearing, the parties entered into numerous stipulations, the most significant of which was that the sole basis for the issuance of each said Order was the language contained in Section 316 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316.

The proposed adjudication submitted by Hearing Examiner Salamon is adopted by the Board with minor modification.

FINDINGS OF FACT

1. Rogers' have owned a parcel of land in the Township of Haverford, Delaware County, for more than thirty-four years. This parcel is more particularly described as follows:

ALL that certain lot or piece of ground with buildings thereon erected situate in Oakmont, Delaware County, Pennsylvania, on the northwest side of Eagle Road, beginning at a point approximately 150 feet northeast of Lawrence Road, containing 366 feet on Eagle Road, 415 feet on the north line, 300 feet on the west line and 200 feet on the south line.

2. On January 10, 1947, Rogers' leased this parcel of land to Samuel T. Jacoby and C. David Jacobs. These gentlemen assigned their rights under said lease to Na-

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4. The relevant geographical area in these proceedings is situate in the Township.

tional Wood Preservers, Inc., a corporation which was controlled by Jacoby.

3. National Wood Preservers, Inc. by Jacoby, conducted a wood preservative business on this parcel of land between March 28, 1947 and July 30, 1963.

4. National Wood Preservers, Inc., by Jacoby, utilized a substance known as pentachlorophenol in this wood preservative business. During the course of the operation of this business, under Jacoby's ownership, waste liquids were discharged or permitted to be discharged from the surface of the land upon which said business was conducted to the ground water via a well on said premises. The Health Officer of the Township and representatives from the Pennsylvania Department of Health, the prececessor in duties to D.E.R., took enforcement action against Jacoby and/or against said corporation by reason of the discharges of these waste liquids to the ground water.

5. On July 30, 1963, Jacoby sold his entire interest in this corporation to the Goldstein family; this family has operated said wood preservative business, Wood, on, *inter alia*, the premises above described, at all times thereafter. Wood, under the ownership of the Goldstein family, has not discharged or permitted the discharge of industrial waste to the waters of the Commonwealth.

6. On February 10, 1967, Wood released a portion of the above described premises from its leasehold. On that same date, Rogers' leased this portion to Shell. It is more particularly described as follows:

ALL THAT CERTAIN lot or piece of ground situate in Haverford Township, Delaware County, Pennsylvania, beginning at the point of intersection of the Easterly right-of-way line of Lawrence Road with the Northerly right-of-way line of Eagle Road; thence in a Northeasterly direction along the Easterly right-of-way line of Lawrence Road a distance of One Hundred Twenty-nine feet (129') more or less to a point; thence in a Northeasterly direction along a line perpendicular to the Easterly

right-of-way line of Lawrence Road a distance of One Hundred Thirty feet (130') more or less to a point; thence in an Easterly direction along a line One Hundred Three feet (103') more or less to a point; thence in a Southeasterly direction along a line One Hundred Three feet (103') more or less to a point on the Northerly right-of-way line of Eagle Road a distance of One Hundred Sixty feet (160') more or less to the place of beginning.

7. Shell has operated and maintained a gasoline service station on said parcel of land at all times thereafter. Shell has not discharged or permitted the discharge of industrial waste to the waters of the Commonwealth.

8. Gum owns and occupies a parcel of land fronting along Eagle Road in the Township. This parcel is on the opposite side of Eagle Road from the parcels which are owned by Rogers' and occupied by Shell and Wood; this parcel is Southwest of the Wood parcel. Gum has not discharged or permitted the discharge of industrial waste to the waters of the Commonwealth.

9. Naylors Run, a stream, begins at a point which is northwest of the Rogers', Shell, Wood premises which have previously been described. Naylors Run flows in a general southerly direction under Woodleigh Road and Hillcrest Road which are northeast and east, respectively, of the Rogers' and Shell and Wood premises. Naylors Run then flows in a general southeasterly direction under Eagle Road via a culvert. This stream re-emerges at a point which is southeast of Eagle Road. It continues to flow in a general southeasterly direction at points which are east of the Gum premises. It is again culverted under railroad tracks which are southeast of the Gum premises, and re-emerges at a point southeast of the Gum premises. It flows in a general southeasterly direction until it is again culverted under portions of roads known as Rittenhouse Circle and Achille Road which are southeast of the Gum premises. It re-emerges

at a point southeast of Rittenhouse Circle and continues to flow in a general southeasterly direction.

10. On June 12, 1972, Joseph A. Feola, who was then employed by D.E.R. as an environmental protection specialist, was requested to investigate complaints of the existence of an oily type material in Naylors Run. Feola was accompanied on this investigation by Ralph V. Zampogna, who was then employed by D.E.R. as a groundwater geologist.

11. During their investigation of Naylors Run on June 12, 1972, Feola and Zampogna observed a small pipe which was projecting out of the west bank of the stream and which was supported by a stone foundation or headwall. From this pipe, a dark colored material with a glossy sheen was being discharged to Naylors Run.

12. Feola obtained a sample of the discharge from this pipe as the discharge was flowing out of the pipe on June 12, 1972. On that same date, Feola and Zampogna collected other samples at the following points:

(a) 5-10 feet downstream from this pipe in Naylors Run.

(b) 155-160 feet downstream from this pipe in Naylors Run.

(c) Upstream from this pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road.

(d) From a basement sump at 425 Rittenhouse Circle.

(e) From a basement sump at 429 Rittenhouse Circle.

13. On June 13, 1972, Feola visited the Gum premises. He went into an area where an addition to an existing building was being constructed and obtained samples from an area where sewage was being pumped (sewer injector) and from a hole which he dug in the earth inside said addition. Each sample was dark black in color, was iridescent and had an oily odor.

14. Feola placed a piece of tape on each bottle in which the samples obtained on June 12 and June 13 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples were obtained. He also recorded this information on a D.E.R. Water or Waste Quality Report Form (WQ report).

15. Feola placed these sample bottles and WQ reports in cardboard containers and on June 13, 1972, he delivered them to the D.E.R. chemistry laboratory in Harrisburg. Theodore Kekich, a D.E.R. laboratory technician, received the samples and the WQ reports. He removed them from the containers, matched each bottle with the corresponding WQ report, assigned laboratory numbers to each WQ report and placed these numbers in a log book. Since Feola had written on each WQ report that he wanted an analysis for oil and pentachlorophenol, Kekich delivered each sample bottle and each WQ report to John Maljevac, another D.E.R. laboratory technician, whose function it was to physically perform such analysis.

16. Michael Defilippo is and was, at all times relevant to this proceeding, a chemist employed by D.E.R. He is and was in charge of all non-routine analyses which are and were performed at the D.E.R. chemistry laboratory in Harrisburg. At the time when these samples were delivered to Maljevac for such analyses, he was Maljevac's supervisor.

17. Defilippo told Maljevac to perform such analyses by employing a method of analysis known as ultraviolet spectroscopy.

18. Pursuant to instructions given by Defilippo on June 15, 1972, Maljevac prepared the samples obtained on June 12, 1972, for ultraviolet spectroscopic analysis for the presence of oil and pentachlorophenol by extracting each, first with sulphuric acid to make each sample acidic, and second, with iso-octane, a material which is

transparent when subjected to ultraviolet radiation. Each sample, so extracted, was poured into a transparent quartz cell which, in turn, was placed into a machine known as a recording spectrophotometer for such ultraviolet testing.

19. Maljevac did not, on June 15, 1972, extract the samples obtained on June 13, 1972, with sulphuric acid. Otherwise, his manner of preparation of these samples was similar to the manner in which he prepared the samples obtained on June 12, 1972.

20. Maljevac operated the recording spectrophotometer so as to produce ultraviolet radiation, the wave lengths of which ranged from 220 to 350 millimicrons. This ultraviolet radiation was caused to pass through the cell containing each sample to determine at what wave lengths the material in each cell would absorb the ultraviolet radiation. Defilippo, whose task it was to interpret the written results of each test (a spectrum) knew in advance that pentachlorophenol extracted in iso-octane, when a sample has been made acidic, absorbs ultraviolet light at wave lengths of 248 and 320 millimicrons, that pentachlorophenol extracted only in isooctane absorbs ultraviolet light at wave lengths of 292 and 302 millimicrons and that oil in isooctane absorbs ultraviolet radiation at a wave length of 253 millimicrons.

21. Oil, which was similar to a fuel oil, was present in the following samples:

(a) The sample taken from the material flowing out of the small pipe projecting out of the west bank of Naylors Run.

(b) The sample taken 5-10 feet downstream from said pipe.

(c) The sample taken 155-160 feet downstream from said pipe.

(d) The sample taken from the sewer injector on Gum property.

(e) The sample taken from the hole which Feola dug on Gum property.

22. Pentachlorophenol was present in the following samples:

(a) The sample taken from the material flowing out of the small pipe projecting out of the west bank of Naylors Run.

(b) The sample taken 5-10 feet downstream from said pipe.

23. There was no conclusive finding of pentachlorophenol in any sample taken on June 13, 1972, from Gum property since the material in each sample, in solution only with iso-octane, did not absorb ultraviolet radiation at wave lengths of 302 and 292 millimicrons.

24. On September 26, 1972, Feola visited the property which Wood was leasing from Rogers'; he caused a well, 24 feet in depth, to be drilled at a point thereon behind the main building; he obtained samples of material found in that well in the following manner:

(a) By lowering a sampling tube to the bottom of the well (2 samples taken at this depth).

(b) By collecting liquid which was dripping from the drill.

(c) By collecting liquid which was on the ground and which was produced in the drilling operation.

(d) By lowering a sampling tube to a depth of 21.5 feet in the well.

25. Feola placed a piece of tape on each bottle in which the samples obtained on September 26, 1972 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples were obtained. He placed a piece of tape over

the cap of each bottle to provide a "legal seal". He also recorded this information on a WQ report.

26. Feola placed these sample bottles and WQ reports in a cardboard container and on September 26, 1972, he sent the container to the D.E.R. chemistry laboratory in Harrisburg by bus. Kekich received these samples and these WQ reports on September 27, 1972. He removed them from the container, matched each bottle with the corresponding WQ report, assigned laboratory numbers to each WQ report and delivered each bottle and each WQ report to Maljevac for spectroscopic analysis for oil and pentachlorophenol.

27. Pursuant to instructions given by Defilippo, Maljevac mixed one of the samples collected from the bottom of the well with the sample collected at a depth of 21.5 feet in the well. Maljevac physically analyzed these samples for the presence of oil and pentachlorophenol by the method of ultraviolet spectroscopy. He also analyzed the second sample collected from the bottom of the well by a method of infrared spectroscopy, pursuant to instructions given by Difilippo. Maljevac prepared each sample, other than that used for infrared spectroscopy, in the same fashion as he had prepared the samples which were obtained on June 13, 1972. Defilippo interpreted each spectrum produced by virtue of these analyses.

28. Oil was present in each sample obtained on September 26, 1972.

29. Pentachlorophenol was present in the following samples:

> (a) The combined samples obtained from the bottom of the well and from a depth of 21.5 feet in the well. These combined samples were also quantitatively analyzed by Defilippo by use of and by reference to a known standard of pentachlorophenol made by Defilippo. The pentachlorophenol content of these combined samples was 1,000 milligrams per liter (mg.1).

(b) The sample obtained by collecting liquid which was on the ground and which was produced in the drilling operation. Quantitative analyses of this sample indicated a pentachlorophenol content of 1,000 mg.1.

(c) The sample obtained from the bottom of the well which was not combined.

30. On August 21, 1973, Zampagna took the following action:

(a) He caused a well, at least 20 feet deep, to be drilled on the property which Shell was leasing from Rogers'. This well was situate at a point near to the southern boundary line of the property which Wood was leasing from Rogers'.

(b) He lowered a sample bottle into that well and obtained a sample of an oily, dark material.

(c) He traveled to an existing well on the property which Wood was leasing from Rogers'. This well was situate at a point which was slightly east of the main building of Wood.

(d) He lowered a sample bottle into that well and obtained a sample of an oily, dark material.

(e) He wrote his sample number, the sample location, the date when each sample was obtained and the Township and County where each sample was obtained on a tape which was placed on each sample bottle. He also recorded this information on a WQ report.

31. The oily, dark material which Zampogna found in the existing well on the property which Wood was leasing from Rogers' rose to a height of 4 ½ feet above the water table at that point.

32. On August 22, 1973, Zampogna took the following action:

(a) He obtained a sample of an oily, dark material from the well which he had caused to be drilled

on the property which Shell was leasing from Rogers'.

(b) He caused a well, approximately 20 feet deep, to be drilled on Gum property at a point on the southerly side of the newly constructed addition to Gum's existing building.

(c) He lowered a sample bottle into that well and obtained a sample.

(d) He wrote his sample number, the sample location, the date when each sample was obtained and the Township and County where each sample was obtained on a tape which was placed on each sample bottle. He also recorded this information on a WQ report.

33. Zampogna sent the samples which he obtained on August 21 and 22, 1973, to the D.E.R. chemistry laboratory in Harrisburg, by bus. These samples and the accompanying WQ reports were received at said laboratory on August 28, 1973, by a D.E.R. employee whose name is unknown. Each bottle was matched with the corresponding WQ report, laboratory numbers were assigned to each WQ report and each sample bottle and WQ report was delivered to Maljevac for spectroscopic analysis for oil and pentachlorophenol.

34. Pursuant to instructions given by Defilippo, on or about August 28, 1972, Maljevac performed an ultraviolet spectroscopic analysis on each such sample for the presence of oil and pentachlorophenol. However, he used water instead of iso-octane as a solvent in the extraction process. He also analyzed all of these samples but the one which he obtained from the well on Gum property by the method of infrared spectroscopy. Defilippo interpreted each spectrum produced by virtue of these analyses.

35. Oil was present in each sample obtained on August 21 and 22, 1973.

36. Pentachlorophenol was present in the following samples:

(a) The sample obtained from the well on the property which Shell was leasing from Rogers'. This sample was also quantitatively analyzed by Defilippo by use of and by reference to a known standard of pentachlorophenol made by Defilippo. The pentachlorophenol content of this sample was 2,600 mg.l.

(b) The sample obtained on August 21, 1973, from the well on the property which Wood was leasing from Rogers'. A quantitative analysis of this sample, per such known standard, demonstrated a pentachlorophenol content of 10,000 mg.1.

(c) The sample obtained from the well on the property which Wood was leasing from Rogers'. A quantitative analysis of this sample, per such known standard, demonstrated a pentachlorophenol content of 4,000 mg.1.

37. On December 10, 1973, Feola and Zampogna obtained samples from the following points:

(a) In Naylors Run at Woodleigh Road.

(b) From the small pipe which was projecting out of the west bank of Naylors Run.[5]

(c) Upstream from said small pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road.[6]

(d) 155-160 feet downstream from his small pipe, in Naylors Run.[7]

38. Feola placed a piece of tape on each bottle in which the samples obtained on December 10, 1973 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples

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5. See Findings of Fact Nos. 11 and 12 for same sampling point.

6. See Finding of Fact No. 12(d) for same sampling point.

7. See Finding of Fact No. 12(c) for same sampling point.

were obtained. He placed a piece of tape over the cap of each bottle to provide a "legal seal". He also recorded this information on a WQ report.

39. Feola placed these sample bottles and WQ reports in a cardboard container and he sent the container to the D.E.R. chemistry laboratory in Harrisburg by bus. Maljevac received these samples and these WQ reports on December 11, 1973. He removed them from the container, matched each bottle with the corresponding WQ report, assigned laboratory numbers to each WQ report and prepared for spectroscopic analysis of each sample for oil and pentachlorophenol.

40. Pursuant to instructions given by Defilippo, on or about December 11, 1973, Maljevac performed an ultraviolet spectroscopic analysis on each such sample for the presence of oil and pentachlorophenol. He used water instead of iso-octane as a solvent in the extraction process. He also analyzed the sample obtained from said small pipe by the method of infrared spectroscopy. Defilippo interpreted each spectrum produced by virtue of these analyses.

41. The following results were obtained by virtue of these analyses.

(a) In the sample obtained from Naylors Run at Woodleigh Road, only unidentifiable trace organics were present.

(c) In the sample obtained at a point upstream from said small pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road, only unidentifiable trace organics were present.

(d) In the sample obtained at a point 155-160 feet downstream from said small pipe, in Naylors Run, oil and 6 mg.1. of pentachlorophenol were present.

42. On January 23, 1974, Feola obtained samples from the following points:

(a) From the small pipe which was projecting out of the west bank of Naylors Run.

(b) Upstream from said small pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road.

(c) In Naylors Run behind 429 Rittenhouse Circle.

43. Feola placed a piece of tape on each bottle in which the samples obtained on January 23, 1974 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples were obtained. He also recorded this information on a D.E.R. Water or Waste Quality Report Form (WQ report).

44. Feola placed these sample bottles and WQ reports in a cardboard container and on or about January 24, 1974, he delivered this container to the D.E.R. chemistry laboratory in Harrisburg. These samples and the accompanying WQ reports were received at said laboratory by a D.E.R. employee whose name is unknown. Each bottle was matched with the corresponding WQ report, laboratory numbers were assigned to eachWQ report and each sample bottle and each WQ report was delivered to Maljevac for spectroscopic analysis for oil and pentachlorophenol.

45. Pursuant to instructions given by Defilippo, on or about January 28, 1974, Maljevac performed an ultraviolet spectroscopic analysis on each such sample for the presence of oil and pentachlorophenol. He used water instead of iso-octane as a solvent in the extraction process. He also analyzed the sample obtained in Naylors Run behind 429 Rittenhouse Circle by the method of infrared spectroscopy. Defilippo interpreted each spectrum produced by virtue of these analyses.

46. The following results were obtained by virtue of these analyses:

(a) The sample obtained from the flow from

said small pipe, oil was present and pentachlorophenol was present.

(b) In the sample obtained at a point upstream from said small pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road, only unidentifiable trace organics were present.

(c) In the sample obtained in Naylors Run behind 429 Rittenhouse Circle, oil and 4 mg.1. of pentachlorophenol were present.

47. In the general area of the Township in which the land owned and/or occupied by the Appellants is situate, there are two observable divides. A "divide" is a point on the ground at which the land on either side thereof slopes away in opposite directions.

48. The first such divide runs in a general northerly and southerly direction. On the easterly side of this divide, the slope of the land is in a general southeasterly direction towards the property owned by Rogers' and occupied by Shell and Wood and towards the property owned by Gum.

49. The second such divide runs in a general easterly and westerly direction. On the northerly side of this divide, the slope of the land is in a general northeasterly direction towards the property owned by Gum.

50. The point where the Shell gasoline is situate is at an elevation of 310 feet above sea level. The property which Wood occupies is at an elevation of 305 feet above sea level. The Gum property is at an elevation of 305 feet above sea level. Naylors Run, at a point where it is nearest to the main building of Gum, is at an elevation of 300 feet above sea level.

51. The highest point below the surface of the ground at which ground water completely fills or saturates soil and other materials at any given point is called the water table.

52. Naylors Run is the surface expression of the water table in this area. It is actually ground water which flows at the surface.

53. Immediately below the surface of the land which is owned and/or occupied by Appellants there is approximately twelve feet of man made material. Beneath this man made material there is approximately eighteen feet of natural, unconsolidated material consisting of silty sands and gravel. Below this natural, unconsolidated material there is bedrock.

54. As a general proposition, where there is unconsolidated material, the water table is a subtle reflection of the surface topography. This means that the flow of ground water will be in the same direction as the slope of the surface land.

55. In respect to the land owned and/or occupied by Appellants, ground water flows from the north-south divide, by gravity, in a southeasterly direction towards this land and towards Naylors Run at various points in Naylors Run which are northeast, east and southeast of this land.

56. In respect to the land owned by Gum, ground water flows from the east-west divide, by gravity, in a northeasterly direction towards this land and towards Naylors Run at various points in Naylors Run which are southeast of this land.

57. Although the natural topography of the surface of the land owned and/or occupied by Appellants has been altered by activities such as construction, this has little effect on the direction of the flow of ground water.

58. The water table at the point where the well was drilled on the property which Shell leases from Rogers' and at the points where the two wells are drilled on the property which Wood leases from Rogers' is between twenty and twenty-five feet below the surface of the ground.

59. Pentachlorophenol mixed with oil is, for the most part, insoluble in water. This means that this mixture exists and flows on top of the water table.

60. Pentachlorophenol mixed with oil is present under the surface of the property owned by Rogers' and

leased, in part, to Shell and, in part, to Wood.

61. The small pipe which Feola observed on June 12, 1972, which was projecting out of the west bank of Naylors Run is the terminus for a thirty-inch storm sewer which is maintained by the Township or by an Authority of which the Township is a member. At the point where material flowing in this pipe enters Naylors Run, the pipe which comprises this storm sewer is not under property owned by Gum. From this point of termination, this storm sewer is laid in a southwesterly direction, and is, in part, under property owned by Gum. The storm sewer is joined by a twelve inch sewer pipe which comes from the direction of a building on property owned by Gum at a manhole, designated as No. 9. The pipe continues to be laid in a southwesterly direction, and is, in part, under property owned by Gum. At a manhole, designated as No. 8, which is on Gum property, the pipe is laid, for a short distance in a northwesterly direction on Gum property at points which are immediately adjacent to a Gum Building. At a manhole, designated as No. 7, which is on Gum property, the placement of the pipe is in a general westerly direction, under property of various owners. The pipe continues westerly under Lawrence Road and it is then located in various directions in and around Achille Road and Eagle Road.

62. On April 11, 1975, employees of the Radnor Haverford Marple Sewer Authority caused the following portions of this storm sewer to be examined by means of a television camera which was pulled through these portions via a cable:

(a) From a manhole at Lawrence Road to manhole No. 7.

(b) From manhole No. 9 to manhole No. 8.

(c) From manhole No. 8 to manhole No. 10.[8]

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8. Mr. Dunn, an employee of the Radnor Haverford Marple Sewer Authority testified that manhole No. 10 was the small pipe which projected out of the west bank of Naylors Run.

63. From the video tape of the inside of this storm sewer a significant flow thereto was visualized from the twelve inch sewer line which joins this storm sewer at manhole No. 9.

64. There were leaks in the pipe which comprises this storm sewer beginning at a point which is four feet from manhole No. 9 and ending at a point which is one hundred eighty feet from manhole No. 9 as it is laid towards manhole No. 8.

65. C. R. Pennoni, a Registered Professional Engineer in Pennsylvania, is the engineer for the Township. He has a great deal of experience in obtaining samples of water to determine whether there are contaminants therein.

66. On May 12, 1975, Pennoni entered manhole No. 9 and he observed an oily, slippery black material present in the storm sewer pipe at this point. He also observed a flow in the twelve inch pipe which joins manhole No. 9. He observed solid material at the bottom of this twelve inch pipe which was not oily and slippery.

67. On May 27, 1975, Pennoni sampled in the following manner at manhole No. 9:

(a) He filled three sample jars with liquid from the flow in the bottom of the storm sewer pipe.

(b) He scraped material from the concrete surface of the storm sewer pipe and placed this material into another sample jar.

(c) He filled three additional sample jars with liquid from the flow in the twelve inch pipe.

(d) He scraped material from the vitrified clay surface of the twelve inch pipe and placed this material into another sample jar.

68. On May 12, 1975, Pennoni entered manhole No. 8 and he sampled at manhole No. 8 by filling three sample jars with liquid from the flow at the manhole invert.

69. Pennoni placed a piece of tape on each sample jar in which the samples obtained on May 12, 1975, were contained. Upon this tape he wrote the date when each sample was obtained, the location where each sample was obtained, the manhole number, the size of the pipe, and he indicated that these were liquid samples. He sealed the cap of each sample jar with another piece of tape, placed each jar in a box and gave the box to Osgood, who was with him when he sampled.

70. Osgood drove to Harrisburg with the box in which these sample jars were contained and on May 13, 1975, he delivered the box to the D.E.R. chemistry laboratory. The samples were refrigerated at the laboratory until May 15, 1975. On that date Osgood copied the information which Pennoni had placed on the sample jars onto five WQ reports. Only five WQ reports were needed because the contents of the three sample jars from the flow in the bottom of the storm sewer pipe at manhole No. 9 were poured into one container, because the contents of the three sample jars from the liquid from the flow in the twelve inch pipe were poured into one container, and because the contents of the three sample jars from the flow at the invert at manhole No. 8 were poured into one container.

71. On May 15, 1975, Defilippo placed laboratory numbers on the five WQ reports, prepared each of the five samples for ultraviolet spectroscopic analysis for the presence of pentachlorophenol, utilized the recording spectrophotometer and obtained the following results:

(a) In the combined sample of the liquid from the flow in the twelve inch pipe, no pentachlorophenol was detected.

(b) In the sample of the material scraped from the surface of the twelve inch pipe, no pentachlorophenol was detected.

(c) In the combined sample of the liquid from the flow in the bottom of the storm sewer pipe at

manhole No. 9, 8 mg.1. of pentachlorophenol were present.

(d) In the sample of the material scraped from the surface of the storm sewer pipe at manhole No. 9, pentachlorophenol was detected.

(e) In the combined sample of the liquid from the flow at the invert at manhole No. 8, .01 mg.1. of pentachlorophenol was present.

72. Pentachlorophenol mixed with oil flows, mostly on top of the water table, under the surface of the property of Rogers' and leased, in part to Shell and in part to Wood. This material then flows in a southwesterly direction under Eagle Road, a highway owned and maintained by the Commonwealth of Pennsylvania. Pentachlorophenol mixed with oil flows, mostly on top of the water table, under the surface of the property of Gum. This material then infiltrates the storm sewer pipe which is maintained by the Township, or by an Authority of which the Township is a member, at points between manhole No. 8 and manhole No. 9. Pentachlorophenol mixed with oil travels in this storm sewer pipe and is discharged to Naylors Run at the terminus of this pipe.

73. Although it appears that the major amount of pentachlorophenol mixed with oil is pooled under the surface of the property of Rogers' and leased, in part to Shell and in part to Wood, there has not been sufficient testing performed to determine:

(a) The total volume of this material under the surface of the property which is owned by and/or leased to Appellants.

(b) How widely this material is dispersed under the surface of the property which is owned by and/or leased to Appellants.

74. There has been sufficient testing performed to determine:

(a) That this material is not present in Naylors Run upstream from the terminus of the storm sewer pipe at the west bank thereof.

(b) That this material is present under property owned and/or maintained by the Commonwealth of Pennsylvania, the Township or an Authority of which the Township is a member, and by landowners or occupiers, the identities of whom or which have not been disclosed in this proceeding.

75. Pentachlorophenol is a solid organic material which is acidic in nature. It is a fungicide, a herbicide and a wood preservative. It is a toxic substance and it is lethal to aquatic organisms in certain concentrations.

76. In order to determine the volume of pentachlorophenol under the surface of the property which is owned by and/or leased to Appellants and in order to determine how widely this material is dispersed thereunder, many more wells must be drilled on said property, to the water table, and additional sampling from these wells must be performed.

77. At the conclusion of this additional drilling and sampling program, a program designed to remove this material could be instituted. This removal program could consist of pumping the major concentration of this material from below the surface of the property owned by Rogers' and leased, in part to Shell and in part to Wood, and properly disposing of it. The second aspect of this removal program could consist of the construction of a trench, which is at least as deep as the depth of the excavation for said storm sewer, from the west bank of Naylors Run to manhole No. 8. This trench should be constructed above, or to the northwest of the storm sewer, in order that it can capture this material as it flows toward the storm sewer. At the terminus of this trench a collecting device could be installed so that the material flowing in this trench can be collected and properly disposed of before it reaches Naylors Run.

78. It is impossible to assess the cost of such a removal program until the further drilling, testing and sampling is completed.

79. The participation of landowners and occupiers, in addition to Appellants, is necessary in order to complete this further drilling, testing, sampling and removal program.

80. Wood, by its present management, has been aware of the pollution problems which have been described above for a number of years. Wood, by its present management, has cooperated with D.E.R. and its predecessor entity, the Pennsylvania Department of Health, in the earlier efforts to remedy these pollution problems on and off the property which Wood occupies.

DISCUSSION

As we stated earlier in this Adjudication, the parties stipulated that the sole authority for the issuance of the Orders from which these consolidated appeals have been taken is Section 316 of The Clean Streams Law, *supra*.

Section 316 provides as follows:

"§691.316 Responsibilities of landowners and land occupiers.

"Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

"For the purpose of collecting or recovering the

expense involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are assessed under the provisions of section 605 of this act: Provided, however, That if the board finds that the condition causing pollution or a danger of pollution resulted from mining operations conducted prior to January 1, 1966, or, if subsequent to January 1, 1966, under circumstances which did not require a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P.L. 372), then the amount assessed shall be limited to the increase in the value of the property as a result of the correction of the condition.

"If the board finds that the pollution or danger of pollution results from an act of God in the form of sediment from land for which a complete conservation plan has been developed by the local soil and water conservation district and the Soil Conservation Service, U.S.D.A. and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of this act."[9] (footnotes omitted)

All Appellants have taken the position that Section 316 is unconstitutional because, as to them, it imposes responsibilities to correct a condition when they neither caused or created such condition nor were at fault as to its continued existence.

Several of the Appellants submit that Section 316 is unconstitutionally vague, that Section 316 is void because it constitutes a taking without due process of law and that it is invalid *ex post facto* legislation.

We are aware that the constitutionality of Section 316 has been questioned. See *Commonwealth of Penn-*

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9. These powers were transferred to D.E.R. by the Act of December 3, 1970, No. 275, P.L. 834, 71 P.S. §510-1 (22).

sylvania vs. Barnes & Tucker Company, 9 Pa. Cmwlth. 1, 303 A.2d 544, 564 (1973) reversed on other grounds, 455 Pa. 392, 319 A.2d 871 (1974); *Acid Mine Drainage and The Pennsylvania Courts*, 11 Duquesne Law Review, 495, 511 (1973).

Although this Board has, in the past, ruled on the constitutionality of other sections of The Clean Streams Law, *see* e.g. *City of Uniontown vs. Commonwealth ofPennsylvania Department of Environmental Resources*, EHB Docket No. 72-203, issued June 19, 1973, we must be mindful of the statement made by Judge Bowman, speaking for the Commonwealth Court of Pennsylvania in *St. Joe Minerals Corporation vs. Goddard*, 14 Pa. Cmwlth. 624, 324 A.2d 800, 802 (1974), that this Board does not have the authority to pass upon the constitutionality of a statute.

For purposes of this Adjudication, we will presume that Section 316 is constitutional. We will leave to the Courts the task of engaging in the indepth analysis which is required to finally decide these questions. We suggest, however, that the Courts should be guided by the following language of the Supreme Court of Pennsylvania in *Commonwealth of Pennsylvania vs. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308, 316-317 (1973), appeal dismissed, 415 U.S. 903 (1974):

> ". . . A state in the exercise of its police power may, within constitutional limitations, not only suppress what is offensive, disorderly or unsanitary, but enact regulations to promote the public health, morals or safety and the general well-being of the community. Bacon v. Walker, 204 U.S. 311, 27 S.Ct. 289, 51 L.Ed. 499 (1907). This power has been used to prevent industrial practices in the use of private property which were injurious to the public. The Slaughter House Cases, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873). The police power may even be exercised over property and current busi-

ness operations, requiring the destruction of existing property, Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), or the imposition of new costs, Queenside Hills Realty Co., Inc. v. Saxl, 328 U.S. 80, 66 S.Ct. 850, 90 L.Ed. 1096 (1946); The Slaughter House Cases, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873). Regulations maintaining the state's water resources have also been held to be within the scope of the police power. Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908); Commonwealth v. Emmers, 33 Pa. Super. 151 (1907), aff'd, 221 Pa. 298, 70 A. 762 (1908). "[9,10] the constitutional standards to apply in determining whether the police power was properly exercised were set forth in Lawton v. Steele, 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894):

" 'To justify the state in . . . interposing its authority in behalf of the public, it must appear-First, that the interest of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' "In applying these standards a regulation must be measured by its "reasonableness," Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). Debatable questions as to "reasonableness" are not for the courts but for the legislature and therefore the presumption of reasonableness is with the state. *Id.* at 595-596, 82 S.Ct. 987 (citations omitted)."

Each of the Appellants contends that Section 316 is inapplicable in these consolidated appeals for the reason that Section 316 applies only to the correction of a condition which exists because of pollution from mine drainage. In support of this contention appellants state that the legislative history of the 1970 amendments to The

Clean Streams Law, one of which amendments is to Section 316, clearly indicates that these amendments are directly solely at the regulation of the coal mining industry. Appellants also point to the fact that the mention of Section 315 of The Clean Streams Law, *supra*, 35 P.S. §691.315,[10] in the language of Section 316, clearly shows that the Legislature intended that Section 316 was to apply solely to coal mining situations.

We disagree with this contention. In the first place, the 1970 amendments to The Clean Streams Law are major revisions to that statute in which the Legislature includes new language as to the discharge of sewage and all industrial wastes to the waters of the Commonwealth and in which, *inter alia*, the Legislature provides a definition of the term "pollution" which is so sufficiently broad that even a most cursory observation of that definition would clearly reveal that "pollution" can be from contaminants other than acid mine drainage.

The legislative history of these amendments demonstrates that they were not directed solely at the mining industry. This is illustrated by the comments of Rep. Wilt contained in *1 Pa. Legislative Journal-House*, p.p. 1728-1729, as follows:

> "As you are aware, H.B. 1353 will further regulate discharge and industrial waste, at the same time giving the Water Board greater leverage in dealing with potential pollution in coal mining. . . .
>
> Under H.B. 1353 the Water Board will also be better equipped to deal with other industries and communities that contribute to the degradation of our streams. None should be permitted to escape the duty of helping to keep our waters clean. If the coal industry, during an era of tremendous pressures that exact ever rising operating expense has been able to meet its environmental obligations with

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10. This section deals exclusively with the operation of and the discharges from a mine.

expediency, *then there is no reason why any segment of our industry or society should lag in the effort that is so vital to the preservation of an essential natural resource.*" (Emphasis supplied)

While we cannot disagree that Section 316 was intended to be an effective tool which could be utilized by D.E.R. to seek relief from a situation where, for instance, mine drainage created as the result of mining operations long since abandoned is present on land and is causing pollution or a danger of pollution, we would not limit its applicability to such a situation.[11]

In order for Section 316 to be applicable to Appellants in these matters, we must determine whether D.E.R. has produced competent evidence to prove that pollution or a danger of pollution is resulting from a condition which exists on land which is owned and/or occupied by Appellants.

In order for this burden to be sustained, it is necessary for D.E.R. to prove that a polluting substance (the "condition") existed on land which is so owned and/or occupied and that this "condition" has reached or threatens to reach the waters of the Commonwealth.

At various times between June 12, 1972 and May 12, 1975, D.E.R. personnel and, in one case, the Township engineer, obtained samples of material at points on the water table below the surface of land owned by Gum

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11. This Board has never placed such limitation on the applicability of Section 316. See *Gossett v. Commonwealth of Pennsylvania Department of Environmental Resources*, E.H.B. Docket No.71-125, issued July 25, 1972, (Section 316 applied to situation where gasoline was found on land); *Harmuth v. Commonwealth of Pennsylvania Department of Environmental Resources*, E.H.B. Docket No. 72-333, issued February , 1973, (Section 316 applied to situation where lechate from land fill was causing pollution); *Sibley et al. v. Commonwealth of Pennsylvania Department of Environmental Resources*, E.H.B. Docket No. 73-160-C, issued October 21, 1975 (Section 316 applied to situation where untreated sewage existed on land.)

and below the surface of land owned by Rogers' and leased by Rogers' in part to Shell and in part to Wood.

At various times between June 12, 1972 and January 23, 1974, D.E.R. personnel obtained samples of material from Naylors Run at points near to the land which is owned and/or occupied by Appellants.

D.E.R. contends that these samples were analyzed at its chemistry laboratory in Harrisburg and that from the results of these analyses it is clear that pollution or a danger of pollution to the waters of the Commonwealth is resulting from a "condition" which exists on each parcel of land which is owned and/or occupied by these Appellants.

Appellants contend that D.E.R. failed to present evidence which is sufficient to connect the testimony of the analyses of these samples with these samples as obtained in the field. They contend that D.E.R. has not established a "chain of custody" of these samples.

Each person who obtained a sample the analysis of which was sought to be introduced in this matter has testified as to the manner in which he obtained it and as to the manner in which he identified it. Each such sample was analyzed by Maljevac who gave a lucid explanation of his method of analysis. If the results of these analyses are to be inadmissible, as contended by Appellants, we must find that there is a fatal gap in the chain of custody between the time when each such sample was obtained and the time when each such sample was analyzed. See *Commonwealth v. Williams*, 458 Pa. 319, 326 A.2d 300, 302 (1974).

As to the samples which were obtained by Feola and Zampogna on June 12 and 13, 1972, there is no chain of custody problem. Each person who handled these samples between the time they were obtained and the time they were analyzed was identified and presented competent testimony with regard to the particular function which each performed.

As to the samples which were obtained by Feola on

September 26, 1972, the only "gap" in the "chain of custody" is that these samples were shipped to said laboratory by bus. We have held, in *Commonwealth of Pennsylvania Department of Environmental Resources v. Rushton Mining Company, et al.* E.H.B. Docket No. 72-361-CP-D, issued March 12, 1976, that the fact that samples were shipped to said laboratory by bus did not preclude D.E.R. from introducing the analyses if those samples into evidence where there was no evidence offered to indicate that the samples had been tampered with. No such evidence has been introduced in this consolidated matter.

As to the samples which Zampogna obtained on August 21 and 22, 1973, we find that these samples were also shipped to said laboratory by bus and that no testimony was presented as to which D.E.R. employee received these samples and delivered them to Maljevac for analysis.

In *Commonwealth v. Jenkins*, 231 Pa. Superior Ct. 490, 332 A.2d 490 (1974), a criminal case, the Court held that there was no rule requiring the prosecution to produce as witnesses all persons who were in a position to come into contact with the article sought to be introduced into evidence. The Court also held that physical evidence could be property admitted despite gaps in testimony regarding custody.

Although we believe that D.E.R. was "sloppy" in the handling of these samples, we hold that the failure to identify the person who received these samples is not a fatal gap in the chain of custody. *See United States v. Clark*, 425 F.2d 827, 832-833 (3rd Cir., 1970).

As to the samples which Feola obtained on December 10, 1973, and on January 23, 1974, and as to the samples which Pennoni obtained on May 12, 1975, we find that there are no new or different chain of custody problems from those which we have already determined to be non-fatal to the admissibility of the results of analyses of earlier obtained samples.

We reject the contention that D.E.R. has failed to establish a chain of custody as to these samples.

To the extent that Appellants, or some of them, contend that the actual samples and/or the actual sample bottles should have been brought to the hearing, such contention is also rejected. The material which comprised each sample was used in the analysis and the bottles were cleaned and used in other D.E.R. activities. Appellants certainly could have obtained their own samples at each and every D.E.R.-Township sampling point and caused an analysis to be made of them.

The next contention advanced by Appellants as to these samples is that they were not analyzed according to the methods and procedures described in the current edition of "Standard Methods for the Examination of Water and Waste Wastewater." Appellants contend that this failure to adhere to the methods and procedures described in said publication is fatal to the admissibility of the analyses of these samples because such adherence is required by virtue of 25 Pa. Code §91.42, a regulation governing D.E.R.

Defilippo, the D.E.R. chemist who supervised these analyses, did not know whether the methods and procedures described in said publication were followed in whole or in part. This Board does not know the answer to this question either, since Appellants presented no evidence that those methods and procedures were not followed. We will presume that these analyses were performed in conformity with the mandate of 25 Pa. Code §91.42 in the absence of evidence to the contrary.

The final contention advanced by Appellants as to the admissibility of the results of the analyses of these samples is that all of them were not quantitatively analyzed. We find no requirement that quantitative analysis of every such sample must be made, although we do not doubt, in context of this particular matter, that additional quantitative analyses would have been helpful in

gaining more insight into the solution of the problems which gave rise to the issuance of these Orders.

We have found that pentachlorophenol mixed with oil is present under the surface of the property owned and/or occupied by each Appellant. These substances constitute the "condition which exists on land in the Commonwealth" which must be found by D.E.R. to trigger the application of Section 316.[12] Such "condition" must, however, be found to be causing pollution or a danger of pollution to further justify the application of Section 316.

In Section 1 of The Clean Streams Law, *supra*, 35 P.S. §691.1, the term "pollution" is defined as follows:

> " 'Pollution' shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. The board shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined."

We have found that pentachlorophenol is a solid organic material which is acidic in nature, which is a fungicide and a herbicide, which is used as a wood pre-

12. *See Gosset v. Commonwealth of Pennsylvania Department of Environmental Resources*, *supra*.

servative, which is toxic and which is lethal to aquatic organisms in certain concentrations. We have found that pentachlorophenol mixed with oil changed the color of Naylors Run at the point in that stream to which it was first discharged. We have found that this material was present in the ground water and in Naylors Run, both of which constitute "waters of the Commonwealth."

We have no difficulty in holding that pentachlorophenol mixed with oil in the waters of the Commonwealth constitutes pollution within the meaning of Section 316. Pollution is resulting from a condition which exists on land which is owned and/or occupied by Appellants.

We reach the point where it is necessary to examine the directives contained in the Orders to Appellants in light of the facts which have developed during the course of the 13 days of hearings in this consolidated matter.

We have found that pollution is resulting from a condition which exists on land which is owned and/or occupied by Appellants.

This finding, standing alone, imposes upon these Appellants the responsibility to correct such condition, notwithstanding the fact that this condition was neither created nor actively maintained by any of them.

As applied to these Appellants, Section 316 is a declaration of their strict liability to correct a condition based upon the mere fact that they own and/or occupy the land under which this condition exists.

If Section 316 is to withstand a constitutional challenge, it must be declared to be a valid exercise of the police power. *Commonwealth of Pennsylvania v. Harmar Coal Company, supra.* It must be noted that a valid exercise of the police power is one which is restricted by the parameters of reason. *Commonwealth of Pennsylvania v. Barnes and Tucker*, 455 Pa. 392, 319 A.2d 871, 886 (1974).

We have found that this same condition which exists on land which is owned and/or occupied by Appellants also exists on land which is owned and/or occupied by persons or entities who or which have not been subjected to D.E.R. action. We have found that this condition and the pollution which results therefrom cannot be abated without the participation of these other landowners and/or occupiers.

D.E.R. has directed these Appellants to institute and implement a correction program which would, of necessity, require all of them to take action outside the geographical boundary of the land which they own and/or occupy.

Although such directives would be a proper exercise of the authority of D.E.R. if these Appellants were found to be in violation of other sections of The Clean Streams Law in which, inter alia, certain activities are declared to be a nuisance, we take the position that Section 316 provides the authority to D.E.R. to require a landowner or occupier to correct a condition *only on the land which is owned or occupied by such person or entity.*

Any other construction of the authority which is granted to D.E.R. under Section 316 would, in our view, unreasonably penalize a person or entity who or which has the misfortune of having a pollution problem under land which he or it owns and/or occupies, which he or it neither created nor actively maintained.

Any other interpretation of the authority which is granted to D.E.R. under Section 316 would, in our view, provide further grounds for claims that this Section is unconstitutional and that enforcement of this Section, insofar as that enforcement required a landowner or occupier to take action outside his or its land, would be discriminatory.

Since it is presumed that the General Assembly in the enactment of a statute does not intend a result which is either unreasonable or unconstitutional, *See* Section 3 of the Statutory Construction Act of 1972, the Act of No-

vember 25, 1970, P.L. 707, 1 Pa. C.S.A. §1922[13], our interpretation of Section 316 is consistent with the intention of the General Assembly.

Since we have found that Section 316 applies to these Appellants to the extent that they can be required to take corrective action on land which is owned and/or occupied by them, it would be logical for the directives contained in these Orders to be amended to require that Appellants take action which is consistent with our interpretation of the responsibilities of each of them under Section 316.

Although this Board has the authority to substitute our discretion for that of D.E.R. by amending these directives,[14] we must first deal with the contention of

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13. The relative liability of the various appellants is a question that must be taken up, if at all, in private litigation among the parties. See our prior opinion in this case on the issue of joinder, 64 D & C 2d 78 (1974). Section 316 is not predicated upon fault but upon the existence of pollution or danger of pollution on an owner or occupier's land. We would think that under common law tort principles, any liability to be assigned for the pollution condition here would fall first on the Jacoby, who was responsible for the creation of the condition; and second, depending to some extent on questions of corporate succession that were not raised in this proceeding, on National Wood Preservers, which succeeded Jacoby in the business; and third, or perhaps jointly with National Wood Preservers, on the owners of the property from which the pollution was generated. We doubt that Shell as a tenant of property that has a ground water pollution problem that it did not cause, or Gum as the owner of property that received ground water pollution from other property could be held liable for that pollution on any common law theory of responsibility. However, Section 316 clearly authorizes the Department to ignore the issue of fault, as it is done here, and proceed against whoever owns or occupies land so as to remedy a pollution problem as quickly as possible. We might prefer a more delicate balancing of responsibility in the Department's action, but we cannot say that their approach is unauthorized.

14. See *Warren Sand & Gravel Co., Inc. et al. v. Commonwealth of Pennsylvania Department of Environmental Resources*, Pa. Cmwlth. 341 A.2d 556, 565-566 (1975); *East Pennsboro Town-*

Appellants that upon the state of the record in this matter no orders to them are justified.

Appellants directed our attention, in this regard, to the decision of the Commonwealth Court of Pennsylvania in *Commonwealth of Pennsylvania vs. Wyeth Laboratories, Division of American Home Products Corporation*, 12 Pa. Cmwlth. 227, 315 A.2d 648 (1974). In *Wyeth*, the Court held that where an entity is held in violation of Section 401 of The Clean Streams Law, *supra*, 35 P.S. §691.401,[15] simply because of its ownership of land and for conditions created long prior to its ownership, the burden of proving that abatement is possible, without being practically prohibitive, rests upon the Commonwealth. (Through D.E.R.)

Appellants argue that *Wyeth* applies here and that D.E.R. has completely failed to meet its burden of proof of such feasibility.

We are not persuaded that the holding in *Wyeth* is applicable to a case arising under Section 316. Although the facts in a Section 316 case may be quite similar to the facts in *Wyeth*, the language of Section 316 is such that we believe that the Legislature clearly intended the responsible party to have the primary burden as to all phases of correction, including the primary burden to show that correction was not feasible.

We need not decide the issue of whether the holding in *Wyeth* is applicable to these consolidated matters

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NOTE 14 — *(Continued)*
ship Authority v. Commonwealth of Pennsylvania Department of Environmental Resources, 18 Pa. Cmwlth. 58, 334 A.2d 798, 804 (1975).

15. Section 401 of The Clean Streams Law provides that "It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

because we are going to issue an Order which contains directives which are different from those which the D.E.R. made. These new directives will require these Appellants to take action which, based upon our reading of all the testimony in this record, is feasible. Furthermore, we are going to retain jurisdiction in these consolidated appeals to decide any questions of feasibility which may arise.

There is a final contention to be determined. Appellants, or some of them, believe that D.E.R. is estopped from requiring them to correct this condition because of the failure of D.E.R. and its predecessor, the Pennsylvania Department of Health to take appropriate enforcement action to cause abatement of this pollution problem which has existed for many years.

We dismiss this contention. In the first place, we have not received sufficient information as to the extent of prior enforcement activities to be able to decide whether they were patently insufficient under The Clean Streams Law as it existed during the period when Samuel Jacoby operated National Wood Preservers, Inc. In the second place, where the state police power is found to exist, it is not lost by non-exercise, but remains to be exerted as local exigencies may demand. See *Commonwealth of Pennsylvania vs. Barnes & Tucker Company*, 455 Pa. 392, 319 A.2d 871, 884 (1974).

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of these consolidated appeals.

2. Section 316 of The Clean Streams Law is constitutional.

3. Section 316 of The Clean Streams Law is applicable to conditions which exist on land in the Commonwealth of Pennsylvania which result in pollution or a

danger of pollution even if such conditions are unrelated to coal mining operations.

4. A condition, the presence of pentachlorophenol mixed with oil, exists on land which is owned by Rogers' and occupied by Shell and by Wood and on other land which is owned by Gum. This condition results in pollution within the meaning of Sections 1 and 316 of The Clean Streams Law.

5. A landowner and/or a tenant may be ordered, by virtue of the authority given to D.E.R. under Section 316 of The Clean Streams Law to correct a condition which exists on land which they own or occupy. A landowner and/or a tenant may not be ordered, pursuant to Section 316 of The Clean Streams Law, to correct a condition on land which they neither own nor occupy.

6. Where D.E.R. issues orders pursuant to the exercise of its discretion, this Board, based upon the record before us on appeal from such orders, may substitute its discretion for that of D.E.R. and modify or amend such orders.

7. Neither D.E.R. nor this Board is estopped from exercising the authority given under Section 316 of The Clean Streams Law in these consolidated appeals.

ORDER

AND NOW, this 30th day of July, 1976, the appeals of National Wood Preservers, Inc., Philadelphia Chewing Gum Corp., Clifford A. Rogers and Virginia M. Rogers, his wife, and Shell Oil Company from Orders dated July 12, 1973, and September 21, 1973, issued by the Commonwealth of Pennsylvania, Department of Environmental Resources are sustained in part and are dismissed in part.

It is further Ordered that said Orders are hereby modified to provide as follows:

1A. Within thirty (30) days from the date of this Or-

der Rogers and Shell (as to property leased to Shell) and Rogers and Wood (as to property leased to Wood) and Gum shall submit to D.E.R. a map and all other necessary supportive data in which there is set forth all points on and under the land that each appellant owns or occupies upon which wells should be drilled and samples obtained and analyzed for the presence of pentachlorophenol mixed with oil.

B. D.E.R. shall promptly study said maps and supportive data and shall promptly inform appellant as to whether D.E.R. is satisfied with the drilling and sampling points set forth therein.

C. Within thirty (30) days from the date when D.E.R. notifies appellant the D.E.R. has accepted the drilling and sampling points set forth in said maps and said supportive data, Rogers' and Shell (as to property leased to Shell), Rogers' and Wood (as to property leased to Wood), and Gum (as to property it owns) shall complete such well drilling and sampling to determine:

(1) The geographical area under each said parcel where a significant concentration of pentachlorophenol mixed with oil is present.

(2) The geographical area under each said parcel where any pentachlorophenol mixed with oil is present.

(3) The profile of the groundwater table at all such points where wells are drilled and sampling is performed.

(4) Whether the pentachlorophenol mixed with oil which is found is largely insoluble in water.

Within five (5) days from the date when such well drilling, sampling and analyses are completed, Appellants shall submit the written findings and results obtained thereby to D.E.R.

D. Within sixty (60) days from the date when D.E.R. provides written authorization for the work to be hereinafter described, Rogers' and Shell (as to property

leased to Shell) and Rogers' and Wood (as to property leased to Wood) shall remove as much pentachlorophenol mixed with oil as is technically feasible by pumping such material from below the surface of the ground and by transporting said material to a suitable disposal site.

E. Within twenty (20) days from the date when D.E.R. notifies Gum that the Commonwealth of Pennsylvania (as to relevant portions of Eagle Road) and other landowners or occupiers of land (at points between the terminus of the thirty inch storm sewer at Naylors Run and manhole No. 8) have completed a drilling and sampling program on their land, as described in A, B and C above, Gum shall submit to D.E.R. a written proposal as to the most feasible method to remove and/or to collect and capture pentachlorophenol mixed with oil which exists on land owned by Gum.

F. Within twenty (20) days from the date when D.E.R. has approved proposals from Gum, from the Commonwealth of Pennsylvania and from said other landowners or occupiers of land as to the most feasible method to remove and/or to collect and capture pentachlorophenol mixed with oil which exists on all such land, Gum shall begin to implement its said proposal as it relates to actions which must be taken on Gum property. Gum shall continue to implement its said proposal as it relates to actions that must be taken on Gum property until as much pentachlorophenol mixed with oil is removed there from and/or is collected and captured as is technically feasible.

IIA. In the alternative, it is Ordered that D.E.R. may direct Appellants, or any of them, to allow D.E.R., or other person or entity, or other agency of the Commonwealth of Pennsylvania, access to land which is owned and/or occupied by Appellants, or any of them, to correct the pollution conditions existing under their lands.

B. D.E.R. may make such election within ten (10) days from the date of this order or within ten (10) days

from the date when Appellants have submitted their well drillings and sampling points map and supportive data to D.E.R.

C. If such election is made by D.E.R., D.E.R. may assess the amount due by reason of such corrective action against each appellant in the same manner as civil penalties are assessed under the provisions of §605 of The Clean Streams Law. No Appellant shall be required to bear the costs of any such corrective action other than to the extent that such costs relate to corrective action taken on land which is owned and/or occupied by each of them.

III. It is further Ordered that this Board retains jurisdiction in these consolidated matters for the purpose of deciding any disputes which may arise by and among the parties hereto with regard to the duties and responsibilities of any of them under this Order.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 30, 1976

IN RE NATIONAL WOOD PRESERVERS

Environmental law - Appeal to Environmental Hearing Board from order of departmental resources - Right of appellant to require joinder of additional defendant.

1. Administrative agencies cannot adjudicate obligations between private parties.

2. Under the Clean Streams Law of June 22, 1937, P.L. 1987, as amended, no entity other than the Department of Environmental Resources has the power to issue abatement and compliance orders to persons or entities alleged to be in violation of that statute, and, consequently, the Environmental Hearing Board has no such power.

3. Upon appeal to the Environmental Hearing Board from an order of the Department of Environmental Resources directing appellant to take steps to alleviate contamination of specified waters, the board had no authority, upon application of appellant, to join as additional defendant a third party alleged by appellant to be the cause of the contamination.

Petition by appellant to Environmental Hearing Board to join additional defendant. Environmental Hearing Board Docket nos. 73-249-S, 73-253-S, 73-346-S, 73-256-S.

Dennis M. Coyne, for Commonwealth.

James S. Kilpatrick, Jr., for Clifford A. Rogers et ux., Appellants

Brynn F. Aurelius, for Shell Oil Co., appellant.

Stephen T. Bolden, of Fell, Spalding, Goff & Rubin, for National Wood Preservers, appellant.

Leonard Dubin, of Blank, Rome, Klaus & Cominsky, for Philadelphia Chewing Gum, defendant.

Stephen A. Arbittier, of Wolf, Block, Schorr & Solis-Cohen, for Samuel T. Jacoby, proposed additional defendant.

BROUGHTON, Chairman of the Board, January 17, 1974.—This matter is before the Environmental Hearing Board on a petition, filed by Shell Oil Company(Shell) to join Samuel Jacoby as an additional defendant.

On or about July 12, 1973, the Department of Environmental Resources (department) issued orders to Philadelphia Chewing Gum Company (Chewing Gum), to National Wood Preservers (National Wood) and to Shell.

In these orders to the above entities, which orders were identically worded, the department made, inter alia, a finding that a contaminant consisting of creosote containing pentachlorophenol was present in the ground waters and surface waters in a defined area of Haverford Township, Delaware County.

The department, in said orders, directed each of the above entities to take action, over a period of time, to define and to alleviate the pollution problems created by the presence of said contaminant.

Each of the above entities filed an appeal to this board from the order of the department which each received, and on September 11, 1973, said entities and the department stipulated to a supersedeas to compliance with each said order, pending a determination of the appeals by this board.

On or about September 21, 1973, the department issued an order to Clifford A. Rogers and Virginia M. Rogers, his wife, wherein the department made findings similar to those contained in its earlier orders to Chewing Gum, National Wood and Shell; and wherein the department directed Mr. and Mrs. Rogers to take abatement actions similar in nature to the actions which Chewing Gum, National Wood and Shell were directed to take.

Mr. and Mrs. Rogers filed an appeal to this board from said order. On October 12, 1973, they and the department stipulated to a supersedeas to compliance

therewith, pending a determination of the appeal by this board.[1]

On or about October 5, 1973, Shell filed a petition with this board by which it sought the joinder of Samuel Jacoby as an additional defendant. Samuel Jacoby was served with a true and correct copy of this petition, and we scheduled a hearing for the purpose of determining whether joinder should be granted. This hearing was held on November 9, 1973, before Louis R. Salamon, Esq., a hearing examiner. The department, Chewing Gum, National Wood, Rogers, Shell and Jacoby were represented by counsel at said hearing.

In its petition for joinder of Samuel Jacoby as an additional defendant, Shell contends that there is evidence, which is set forth in the various prehearing memorandums filed with this Board by National Wood[2] that Jacoby, the previous owner of National Wood, discharged or caused the discharge of the contaminants to the waters of the Commonwealth, which discharge gave rise to the issuance of the various orders by the department.

Shell alleges that the testimony of the department's geologist, produced at a deposition, supports this contention as to Jacoby's actions.

Shell avers that the department has the power under and by virtue of The Clean Streams Law of June 22, 1937, P.L. 1987, as amended, 35 PS §691.1, et seq., and, indeed, the duty under said act, to include Jacoby as a party in proceedings designed to cause abatement of the pollution allegedly being caused to the waters of the Commonwealth.

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1. By our order dated November 1, 1973, the appeals of Chewing Gum, National Wood, Rogers and Shell were consolidated for hearing.

2. At the hearing on this petition for joinder, Chewing Gum, National Wood and Mrs. and Mrs. Rogers joined in Shell's request that Jacoby be joined as an additional defendant.

The department did not, however, issue an order to Jacoby to abate any pollution problems which the department found to exist, nor did the department take any other enforcement action against Jacoby.

Shell contends that our authority to join Jacoby as an additional defendant in these proceedings arises by virtue of the provisions of section 21.18(a) of Chapter 21 of Title 25, Rules and Regulations, Department of Environmental Resources, Rules of Practice and Procedure. This section provides as follows:

"§21.18. Pleadings.

"(a) Except as provided otherwise in these Rules of Procedure, the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this board, and such pleadings shall have the functions defined in the Pennsylvania Rules of Civil Procedure. The form of pleadings, including where applicable the requirement for verification, shall be as specified in The Pennsylvania Rules of Civil Procedure.[3]

Since Rules 2252, et seq., of the Pennsylvania Rules of Civil Procedure provide a mechanism whereby the defendant in an action may join as an additional defendant any person, whether or not a party, who may be alone liable to plaintiff or liable over to defendant on plaintiff's cause of action or jointly or severally liable with defendant or liable to defendant on a related cause of action, Shell reasons that under the authority of section 21.18,

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3. When this petition for joinder was filed and when the hearing on this petition was held, section 21.18, supra, was only a proposed addition to the Rules of Practice and Procedure of this board. This section was adopted by the Environmental Quality Board on December 15, 1973, to be effective on and after December 30, 1973. See Pa. B.2815, December 15, 1973.

For purposes of this opinion, we will consider section 21.18, supra, to be in effect since, as a practical matter, Shell could now simply withdraw its petition filed in October 1973, and file an identical petition, in which section 21.18, supra, would be offered as the procedural authority for joinder of Jacoby.

supra, Jacoby can be brought into these proceedings as an additional defendant.

We find first that under no circumstances can this board adjudicate the responsibility, obligations or liability of Jacoby to Shell, Chewing Gum, National Wood or Mr. and Mrs. Rogers. It is well settled that administrative agencies cannot adjudicate obligations between private parties: National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, 84 L.Ed. 799, 60 S.Ct. 569, 576 (1940); Lacy v. East Broad Top Railroad & Coal Co., 168 Pa. Superior Ct. 351, 77 A.2d 706, 710 (1951).

Since these proceedings brought by the department against Chewing Gum, National Wood, Mr. and Mrs. Rogers and Shell are based upon their responsibility, under The Clean Streams Law, supra, to abate pollution problems, it is clear that if Jacoby is to be made a party to these proceedings, his responsibility should also be based upon considerations of The Clean Streams Law, supra.

Nowhere in The Clean Streams Law, supra, or in The Administrative Code of April 9, 1929, P.L. 177, Art. XIX, added December 3, 1970, P.L. 834, 71 PS §510-1, et seq., has the legislature extended to any entity, other than the department, the power to issue abatement and compliance orders to persons or entities alleged to be in violation of The Clean Streams Law, supra.

Therefore, we find that section 21.18, supra, cannot be authority for the joinder of Jacoby, by Chewing Gum, National Wood, Mr. and Mrs. Rogers or Shell, under the theory that Jacoby is subject to the sanctions, penalties and controls set forth in The Clean Streams Law, supra.

Such a joinder must, we find, be initiated and accomplished by the department. Any other construction of section 21.18, supra, would be contrary to the obvious intent of the legislature, when it vested the power to enforce The Clean Streams Law, supra, in the department.

This principle was recognized by Chewing Gum, National Wood, Rogers and Shell at the hearing on this

petition for joinder. They stipulated that the prayer of the petition for joinder of Jacoby would be satisfied if this board ordered the department to issue an order to Jacoby, the contents of which would be the same or similar to the contents of the orders which the department has already issued to Chewing Gum, National Wood, Mr. and Mrs. Rogers and Shell.

The practice and procedure under which this board conducts its hearings is governed by rules and regulations promulgated by the Environmental Quality Board. Section 21.18, supra, is one of those rules and regulations.

We must determine whether under section 21.18, supra, or under any other enactment, we have the authority to order the department to issue an abatement and compliance order to Jacoby.

We must be guided in this determination by the well settled proposition that administrative agencies are not empowered to make regulations which violate or exceed the powers and duties given them by the statute under which they function. The power of an administrative agency to prescribe rules and regulations under a statute is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute: *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308, 319 (1973); Volunteer Firemen's Relief Assn. of the City of Reading v. Minehart, 425 Pa. 82, 227, A.2d 632, 635, 636 (1967); *Commonwealth v. DiMeglio*, 385 Pa. 119, 122 A.2d 77 (1956); *Commonwealth, Department of Public Instruction v. Emerson C. Custis*, 47 Dauph. 233 (1939), appeal quashed 139 Pa. Superior Ct. 22, 10 A.2d 850 (1940).

As we have indicated previously, the entity charged by the legislature with the enforcement of The Clean Streams Law and, with few exceptions, the other pollution control laws of this Commonwealth is the department.

The legislature created this board and set forth our authority in The Administrative Code of April 9, 1929, as amended, supra, section 20, 71 PS §510-21. This section provides as follows:

> "(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P. L. 1388), known as the 'Administrative Agency Law,' on any order, permit, license or decision of the Department of Environmental Resources.
>
> "(b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.
>
> "(c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected this appeal in the manner hereinafter specified.
>
> "(d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.
>
> "(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall

include time limits for the taking of appeals, procedures for the taking of appeals, locations at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

"(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

"(g) The board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such other order as the circumstances require.

"1929, April 9, P. L. 177, art. XIX-A, §1921-A, added 1970, Dec. 3, P. L. 834, No. 275, §20, effective January 19, 1971."

It is clear that the legislature extended no enforcement function to this board. Our powers are clear. We are to hold hearings and issue adjudications on any order, permit, license or decision of the department.

If section 21.18, supra, can be interpreted to mean that we have the power and authority to require the Department to enforce the Clean Streams Law against Samuel Jacoby or against any other person or entity who has not been made the subject of any enforcement action taken by the department, we would, in effect, have the enforcement power that the legislature clearly did not extend to us.

We do not believe that in promulgating section 21.18, supra, the Environmental Quality Board intended that we have such substantive powers. If, however, such enforcement powers were extended to this board in section 21.18, supra, the Environmental Quality Board has exceeded its authority and/or has extended to this board

a power which the legislature has not extended to us.

We would state, finally, that the power and authority to be exercised by administrative agencies must be conferred by clear, unmistakable legislative language. A doubtful power does not exist; *Green v. Milk Control Commission*, 340 Pa. 1, 16 A.2d 9 (1940); *Elias, et al. v. Environmental Hearing Board, et al.* 10 Comm. Ct. 489, A.2d (1973).

If the department, in the exercise of its enforcement function, determines that Samuel Jacoby has violated The Clean Streams Law, supra, or any other environmental pollution control statute or regulation, it is up to the department, and not this board to take appropriate action against him.[4]

ORDER

And now, to wit, January 17, 1974, the petition for joinder of Samuel Jacoby as an additional defendant in these appeals, consolidated for hearing, is denied.

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4. We do not mean to say by this opinion the public is entirely without a remedy if the department fails to take enforcement action to protect the environment.

SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT CLIFFORD ROGERS and VIRGINIA ROGERS, *Appellants*	No. 67 January Term 1979
v.	(No. 1415
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	C.D. 1976)

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the COMMONWEALTH COURT, be, and the same is hereby AFFIRMED.

BY THE COURT:

Sally Mryos, Esquire
Prothonotary

Dated: April 24, 1980

IN THE
SUPREME COURT OF PENNSYLVANIA

NATIONAL WOOD PRESERVERS, INC., *Appellant*	No. 66 January Term, 1979

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

and

CLIFFORD ROGERS and VIRGINIA ROGERS,

and

SHELL OIL COMPANY

and

PHILADELPHIA CHEWING GUM CORPORATION,
Appellees

and

TOWNSHIP OF HAVERFORD,
Intervenor

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that National Wood Preservers, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Judgment and Opinion of the Supreme Court of Pennsylvania entered on April 24, 1980, affirming the Order of the Commonwealth Court of Pennsylvania.

This action is taken pursuant to 28 U.S.C. §1257(2).

FELL, SPALDING, GOFF & RUBIN
By: _____
STEPHEN R. BOLDEN,
ESQUIRE

By: _____
MICHAEL S. LUBLINE,
ESQUIRE

By: _____
ALEXANDER N. RUBIN,
ESQUIRE

Counsel for Appellant:

1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106
(215) 925-8300
Dated: July 3, 1980

CERTIFICATION OF SERVICE

I hereby certify that I am hereby this date serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121.

Service by First-Class Mail
Adressed as Follows:

Commonwealth Court of Pennsylvania
Fifth and Sixth Floors
South Office Building
Harrisburg, Pennsylvania 17120

Environmental Hearing Board
Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101

J. Stoke Adams, III, Esquire
2000 Two Penn Center Plaza
Philadelphia, Penna. 19102
Counsel to Appellee, Shell Oil Company

Leonard Dubin, Esquire
1100 Four Penn Center Plaza
Philadelphia, Penna. 19103
Counsel for Appellee,
Philadelphia Chewing Gum Corporation

James S. Kilpatrick, Jr., Esquire
15 Rittenhouse Place
Ardmore, Penna. 19003
Counsel to Appellees,
Clifford and Virginia Rogers

William Mowatt, Esquire
Courthouse Square West
229 North Olive Street
Media, Penna. 19063
Counsel to Township of Haverford,
Intervenor

K. W. James Rochow, Esquire
Assistant Attorney General
Department of Environmental Resources
Bureau of Litigation Enforcement
Suite 1200 - 1315 Walnut Street
Philadelphia, Penna. 19107

Service by Hand-Delivery
Addressed as Follows:
Supreme Court of Pennsylvania
Office of the Prothonotary
456 City Hall South
Philadelphia, Penna. 19107

FELL, SPALDING, GOFF & RUBIN

By: _____
STEPHEN R. BOLDEN, ESQUIRE
MICHAEL S. LUBLINE, ESQUIRE
ALEXANDER N. RUBIN, ESQUIRE
Counsel for Appellant

1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106
(215) 925-8300
Dated: July 3, 1980

AFFIDAVIT OF SERVICE

I, Alexander N. Rubin, Esquire, in the offices of Fell, Spalding, Goff & Rubin, attorneys of record for National Wood Preservers, Inc., Appellant herein, depose and state that I served, pursuant to the United States Supreme Court Rule 28.5(c), a copy of the foregoing Notice of Appeal in the Supreme Court of the United States, upon the persons and in the manner indicated below:

Service by First-Class Mail
Addressed as Follows:
Commonwealth Court of Pennsylvania
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Harrisburg, Pennsylvania 17120

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Philadelphia, Penna. 19102
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1100 Four Penn Center Plaza
Philadelphia, Penna. 19103
Counsel for Appellee,
Philadelphia Chewing Gum Corporation

James S. Kilpatrick, Jr., Esquire
15 Rittenhouse Place
Ardmore, Penna. 19003
Counsel to Appellees,

Clifford and Virginia Rogers
William Mowatt, Esquire
Courthouse Square West
229 North Olive Street
Media, Penna. 19063
Counsel to Township of Haverford,
Intervenor

K. W. James Rochow, Esquire
Assistant Attorney General
Department of Environmental Resources

Bureau of Litigation Enforcement
Suite 1200, 1315 Walnut Street
Philadelphia, Penna. 19107

Service by Hand-Delivery
Addressed as Follows:
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Philadelphia, Penna. 19107

FELL, SPALDING, GOFF & RUBIN

By: _____
STEPHEN R. BOLDEN,
ESQUIRE
MICHAEL S. LUBLINE,
ESQUIRE
ALEXANDER N. RUBIN,
ESQUIRE
Counsel for Appellant

1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106
(215) 925-8300
Dated: July 3, 1980
SWORN TO AND SUBSCRIBED:
Before me this day:
of , 1980.:

_____
Notary Public

IN THE
SUPREME COURT OF PENNSYLVANIA

CLIFFORD ROGERS *and* VIRGINIA ROGERS,
Appellants

No. 67, JANUARY TERM, 1979

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

and

NATIONAL WOOD PRESERVES, INC.

and

SHELL OIL COMPANY,

and

PHILADELPHIA CHEWING GUM CORPORATION
Appellees

and

TOWNSHIP OF HAVERFORD,
Intervenor

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Clifford Rogers and Virginia Rogers, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the Final Judgment and Opinion of the Supreme Court of Pennsylvania entered on April 24, 1980, affirming the Order of the Commonwealth Court of Pennsylvania.

This action is taken pursuant to 28 U.S.C. Section 1257(2).

HAWS & BURKE

James S. Kilpatrick, Jr.

Counsel for Appellant
15 Rittenhouse Place
Ardmore, Pennsylvania 19003
(215) 649-5200

Dated: July 10, 1980

CERTIFICATION OF SERVICE

I hereby certify that I am hereby this date serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121.

Service by First-Class Mail
Addressed as Follows:
Commonwealth Court of Pennsylvania
Fifth and Sixth Floors
South Office Building
Harrisburg, Pennsylvania 17120

Environmental Hearing Board
Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101

J. Stokes Adams, III, Esquire
2000 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102
Counsel to Appellee, Shell Oil Company

Leonard Dubin, Esquire
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103
Counsel to Appellee, Philadelphia Chewing Gum Corporation

Stephen R. Bolden, Esquire
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106
Counsel to Appellee, National Wood Preservers, Inc.

Service by Hand-Delivery
Addresses as Follows:
Supreme Court of Pennsylvania
Office of the Prothonotary
456 City Hall South
Philadelphia, Pennsylvania 19107

Service by First-Class Mail
Addressed as Follows (Continued)
William Mowatt, Esquire
Courthouse Square West
229 North Olive Street
Media, Pennsylvnaia 19063
Counsel to Township of Haverford, Intervenor

K. W. James Rochow, Esquire
Assistant Attorney General
Department of Environmental Resources
Bureau of Litigation Enforcement
Suite 1200-1315 Walnut Street
Philadelphia, Pennsylvania 19107

James S. Kilpatrick, Jr.
Counsel for Appellants

15 Rittenhouse Place
Ardmore, Pennsylvania 19003
(215) 649-5200
Dated: July 10, 1980

AFFIDAVIT OF SERVICE

I, James S. Kilpatrick, Jr., Esquire, in the offices of Haws & Burke, attorneys of record for Clifford Rogers and Virginia Rogers, Appellants herein, depose and state that I service, pursuant to the United States Supreme Court Rule 28.5(c), a copy of the foregoing Notice of Appeal in the Supreme Court of the United States, upon the persons and in the manner indicated below:

Service by First-Class Mail
Addressed as Follows:
Commonwealth Court of Pennsylvania
Fifth and Sixth Floors
South Office Building
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J. Stokes Adams, III, Esquire
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1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106
Counsel to Appellee, National Wood Preserves, Inc.

William Mowatt, Esquire
Courthouse Square West
229 North Olive Street
Media, Pennsylvania 19063
Counsel for Township of Haverford, Intervenor

K. W. James Rochow, Esquire
Assistant Attorney General
Department of Environmental Resources
Bureau of Litigation Enforcement
Suite 1200-1315 Walnut Street
Philadelphia, Pennsylvania 19107

HAWS & BURKE

James S. Kilpatrick, Jr.
Counsel for Appellants

15 Rittenhouse Place
Ardmore, Pennsylvania 19003
(215) 649-5200
Dated: July 10, 1980

SWORN TO and SUBSCRIBED
before me this 10 day
of July, 1980.
/s/Linda A. Lewis

Notary Public
LINDA A. LEWIS, Notary Public
Lower Merion Twp., Montgomery Co.
My Commission Expires August 29, 1983

STATUTES INVOLVED

The applicable provision of the 1970 amendments to The Pennsylvania Clean Streams Law are as follows:

Section 316 is amended to read:

Responsibilities of landowners and land occupiers

Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

For the purpose of collecting or recovering the expense involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are assessed under the provisions of section 605 of this act: Provided, however, That if the board finds that the condition causing pollution or a danger of pollution resulted from mining operations conducted prior to January 1, 1966, or, if subsequent to January 1, 1966, under circumstances which did not require a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P.L. 372), then the amount assessed shall be limited to the increase in the value of the property as a result of the correction of the condition.

If the board finds that the pollution or danger of pollution results from an act of God in the form of

sediment from land for which a complete conservation plan has been developed by the local soil and water conservation district and the Soil Conservation Service, U.S.D.A. and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of this act.
1937, June 22, P.L. 1987, art. III, §316, added 1965, Aug. 23, P.L. 372, §5. As amended 1970, July 31, P.L. 653, No. 222, §12. 35 Pa. Stat. Ann. §691.316)

Section 602 is amended to read:

Penalties

(a) Any person or municipality who violates any provision of this act, any rule or regulation of the department, any order of the department, or any condition of any permit issued pursuant to this act is guilty of a summary offense and, upon conviction, such person or municipality shall be subject to a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each separate offense, and, in default of the payment of such fine, a person shall be imprisoned for a period of sixty days.

(b) Any person or municipality who wilfully or negligently violates any provision of this act, any rule or regulation of the department, any order of the department, or any condition of any permit issued pursuant to the act is guilty of a misdemeanor of the third degree and, upon conviction, shall be subject to a fine of not less than two thousand five hundred dollars ($2,500) nor more than twenty-five thousand dollars ($25,000) for each separate offense or to imprisonment for a period of not more than two years, or both.

(c) Any person or municipality who, after a conviction of a misdemeanor for any violation within two years as above provided, wilfully or negligently violates any provision of this act, any rule or regulation of the department, any order of the department,

or any condition of any permit issued pursuant to this act is guilty of a misdemeanor of the second degree and, upon conviction, shall be subject to a fine of not less than two thousand five hundred dollars ($2,500) nor more than fifty thousand dollars ($50,000) for each separate offense or to imprisonment for a period of not more than two years, or both.

(d) Each day of continued violation of any provision of this act, any rule or regulation, of the department, any order of the department, or any condition of any permit issued pursuant to this act shall constitute a separate offense.

(e) The maximum fines specified under this section are established pursuant to requirements set forth by the United States Environmental Protection Agency in accordance with the "Federal Water Pollution Control Act" (33 U.S.C. §1251 et seq.) 1937, June 22, P.L. 1987, art. VI, §602. As amended 1970, July 31, P.L. 653, No. 222, §16; 1976, Oct. 7, P.L. 1099, No. 222, §1. (35 Pa. Stat. Ann. §691.602).

25a

Examiner's Exhibit #1

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

IN THE MATTER OF:	Industrial
NATIONAL WOOD PRESERVERS	Waste
Eagle Road & Pennsylvania	Haverford
Railroad	Township
Havertown,	Delaware
Pennsylvania	County

ORDER

WHEREAS, a serious problem of contamination exists in the ground waters and surface waters in the area of the intersection of Eagle Road and Penn Central Railroad in Havertown Township, Delaware County, Pennsylvania, more specifically described as on the Lansdowne, Pennsylvania seven and one half minute topographic quadrangle, 1967, 9.5 inches west and 19.5 inches north of lower right hand corner; and

WHEREAS, said contaminant consists of creosote containing pentachlorophenol. Said contaminant appears in both ground and surface water including waters of the Commonwealth locally known as Naylor's Run, a tributary of Cobbs Creek; and

WHEREAS, said contaminant degrades the quality of the waters of the Commonwealth. Said contaminant is therefore subject to the sanctions of the Clean Streams Law of the Commonwealth of Pennsylvania.

NOW, TO WIT, this 12th day of July, 1973, you are hereby ordered to:

1. Take concerted action with the other companies to whom this order is directed (Philadelphia Chewing Gum Company and Shell Oil Company) to submit a proposal which shall include:

A. Define the specific geographical area of said creosote contamination and report said areas to the Department of Environmental Resources, 1875 New Hope Street, Norristown, Pennsylvania.

B. Provide the Department of Environmental Resources with a profile of the groundwater table of the geographical area described above, and

C. Submit to the Department of Environmental Resources engineering plans to remove the contaminants from the groundwater and surface water to a degree which will restore those waters to their natural quality.

This proposal must be in the hands of the Department of Environmental Resources by August 6, 1973.

2. Provide the Department of Environmental Resources by August 27, 1973, with a final proposal of engineering plans for elimination and removal of said creosote contaminant and restoration of the waters which is acceptable to the Department of Environmental Resources. An integral part of this final proposal shall be a time schedule of implementation of said final proposal.

3. Implementation of approved plans shall be given to the Department of Environmental Resources, 1875 New Hope Street, Norristown, Pennsylvania 19401.

Any person aggrieved by this Order shall have the right to enter an appeal with the Environmental Hearing Board, First Floor, Blackstone Building, Harrisburg, Pa. 17102. Rules of Practice and Procedure before the Board are set forth in Chapter 21 of the Department Rules and Regulations, a pertinent portion of which is attached hereto.

FOR THE DEPARTMENT OF
ENVIRONMENTAL RESOURCES

RICHARD L. HINKLE
Acting Regional Sanitary Engineer

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF
ENVIRONMENTAL RESOURCES

IN THE MATTER OF	Pollution Condition
CLIFFORD A. ROGERS and	Haverford Township
VIRGINIA M. ROGERS, his wife	Delaware County

ORDER

WHEREAS, Clifford A. Rogers and Virginia M. Rogers, his wife, own certain land in the area of the intersection of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania, are specifically described as on the Landsdowne, Pennsylvania seven and one half minute topographic quadrangle, 1967, 9.5 inches west and 19.5 inches north of lower right hand corner, and

WHEREAS, the Department of Environmental Resources ("Department") of the Commonwealth of Pennsylvania ("Commonwealth") has found on the basis of its inspections, *inter alia*, September 26, 1972, August 21, 1973 and August 22, 1973, that a polluting substance containing pentachlorophenol, fuel oil and creosote ("pollutant") is found in the groundwaters in the area, including the land owned by Clifford A. Rogers and Virginia M. Rogers, his wife; and leased to National Wood Preservers and Shell Oil Company, as well as the land owned by Philadelphia Chewing Gum; and in the surface waters, including Naylor's Run, a tributary to Cobb Creek ("waters"), and

WHEREAS, National Wood Preservers, Philadelphia Chewing Gum, and Shell Oil Company, by Orders dated July 12, 1973 ("Orders") were directed to take concerted action to remove the pollutants and restore to the waters to their natural water quality in accordance with the specific directives contained in the Orders, appeals from

which Orders have been taken to the Environmental Hearing Board by National Wood Preservers as Docket No. 73-249, Shell Oil Company as Docket No. 73-256, and Philadelphia Chewing Gum as Docket No. 73-213.

NOW, TO WIT, this 21st day of September, 1973, you are hereby directed individually and/or jointly with National Wood Preservers, Philadelphia Chewing Gum and Shell Oil Company to submit to the Department's office at 1875 New Hope Street, Norristown, Pennsylvania.

1. On or before October 19, 1973, a preliminary proposal acceptable to the Department that shall include:

(1) A definition of the specific geographical area in which the pollutant is found; and

(2) A profile of the groundwater table in the area in which the pollutant is found, and

(3) A proposal to remove the pollutant from the waters, restoring the waters to their natural quality.

2. On or before November 9, 1973 a final proposal acceptable to the Department to remove the pollutant from the waters, restoring the waters to their natural quality; which proposal shall include an implementation schedule acceptable to the Department.

3. Implement the final proposal in accordance with the implementation schedule.

Any person aggrieved by this Order shall have the right to enter an appeal with the Environmental Hearing Board, First Floor, Blackstone Building, Harrisburg, Pa. 17102. Rules of Practice and Procedure before the Board are set forth in Chapter 21 of the Department Rules and Regulations, a pertinent portion of which is attached hereto.

FOR THE DEPARTMENT OF
ENVIRONMENTAL RESOURCES

C. T. Beechwood
Regional Sanitary Engineer

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA CHEWING GUM CORPORATION, — No. 1389 C.D. 1976

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

SHELL OIL COMPANY, — No. 1390 C.D. 1976

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and TOWNSHIP OF HAVERFORD,

Respondents

NATIONAL WOOD PRESERVERS, INC., — No. 1395 C.D. 1976

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

CLIFFORD ROGERS and VIRGINIA ROGERS, — No. 1415 C.D. 1976

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

NATIONAL WOOD PRESERVERS, INC.

PETITION FOR CONTINUATION OF SUPERSEDEAS PREVIOUSLY ENTERED

AND NOW comes petitioner, National Wood Preservers, Inc., by and through its attorney, Fell, Spalding, Goff & Rubin, and hereby submits a Petition pursuant to Rule No. 1732 of the Pennsylvania Rules of Appellate Procedure requesting that this Honorable Court continue, in effect, a supersedeas previously entered on this matter on October 15, 1976 and assigns the following reasons in support thereof.

1. This case in the Commonwealth Court resulted from an Order entered by the Environmental Hearing Board in consolidated appeals by four landowners or occupiers against whom respondent Commonwealth of Pennsylvania, Department of Environmental Resources, had brought enforcement proceeds pursuant to Section 316 of the Clean Stream Law in order to eradicate a polluting condition.

2. On October 15, 1976, this court, after argument, granted the request of all petitioners including your petitioner National Wood Preservers, Inc. for supersedeas "pending final disposition of the case". Attached hereto, incorporated herein, and marked as Exhibit "A" hereto, is a copy of said Order.

3. On May 24, 1978, this court filed an Opinion and Order sustaining the appeals of Philadelphia Chewing Gum and Shell Oil Company in these consolidated matters; but dismissing the appeals of your petitioners, National Wood Preservers, Inc. and Clifford and Virginia Rogers. Attached hereto, incorporated herein, and marked as Exhibit "B" hereto, is a copy of the May 24, 1978 Opinion and Order.

4. On June 16, 1978, your petitioner, National Wood Preservers, Inc. filed with the Supreme Court of

Pennsylvania, a petition for leave to appeal the order of this court entered on May 24, 1978. Attached hereto, incorporated herein, and marked as Exhibit "C" hereto, is a copy of the aforesaid Petition of National Wood Preservers, Inc. exclusive of exhibits, which are already a matter of record in this court.

5. This court affirmed the finding of the Board that the polluting condition which petitioner has been ordered to eradicate was not created or contributed to by petitioner National Wood Preservers, Inc. but rather created by the actions of a third party, one Samuel T. Jacoby, sometime prior to and up to the year 1956. (See Opinion of Commonwealth Court at pages 4 and 5)

6. There is no evidence in the record nor any findings of fact that the condition which your petitioner has been ordered to eradicate is worsening or is being aggravated by a furthering or continuing pollution discharges.

7. To the contrary, the Board has found, and this court has affirmed its findings, that neither your petitioner nor the other parties proceeded against have done any act constituting a discharge of industrial waste to the waters of the Commonwealth; and, therefore, since the conduct which brought about the polluting condition occured through the activity of a third party, Samuel T. Jacoby, prior to 1956, then the polluting condition in question is in a stable condition having existed in the same condition for at least 22 years.

8. At the time of the Hearing before the Environmental Hearing Board, the respondent, The Department of Environmental Resources presented the testimony from its expert, John Osgood, which indicated that the cost of removing the pollutants exclusive of long term operating and dispersing cost would probably not exceed $49,100.00. Attached hereto, incorporated herein, and marked as Exhibit "D" hereto, are pages 118 and 119 of the record of testimony before the Board on January 17, 1975.

9. On or about October 28, 1976, the Federal Environmental Protection Agency advised your petitioner that it was going to take action to remove the polluting condition in question. Attached hereto, incorporated herein, and marked Exhibit "E" hereto is a copy of the October 28, 1976 letter from the Environmental Protection Agency advising same.

10. At the time of notifying petitioner as aforesaid, the Environmental Protection Agency indicated that the cost of removal would range between $50,000.00 and $200,000.00. Attached hereto, incorporated herein, and marked as Exhibit "F" hereto, is "Polrep 12" with respect thereto.

11. Thereafter, on November 2 the Environmental Protection Agency, through its private contractor commenced the work in question. Attached hereto, incorporated herein, and marked as Exhibit "G" hereto, a "Polrep 13" of the EPA indicating the aforesaid start of the pollution control clean up in question.

12. As of January 7, 1977, or a period of slightly less than two months after the work of eradicating the polluting condition in question had been commenced, the actual cost to the EPA of said removal had then amounted to $118,000.00 with an estimated ceiling of $170,000.00. Attached hereto, incorporated herein, and marked as Exhibit "H" hereto, is "Polrep 22" indicating the aforesaid cost.

13. On or about June 2, 1977, the EPA in a transmittal to the Third Coast Guard District indicated that as of that time, approximately $180,000.00 had been spent on the clean up. Attached hereto, incorporated herein, and marked as Exhibit "I" hereto, is a copy of the letter to the Third Coast Guard District indicating same.

14. It is believed and therefore averred that sometime prior to June 2, 1977, the EPA discontinued its major efforts in eradicating the polluting condition in question in order to await the outcome of the above captioned proceeds although it has on a weekly basis, down to the

present time, engaged in certain minor work in connection therewith.

15. It is believed and therefore averred that the amount expended by the EPA up until June 2, 1977 of approximately $180,000.00 only paid for the removal of a small amount of the alleged pollutant in the ground and surface waters of the Commonwealth and that the cost in question does not reflect the cost of removing the entire amount of said pollutant from the waters of the Commonwealth, which cost it is believed will be substantially in excess of that money spent to date.

16. The amount of time that is required to do the acts demanded by the Board's July 30, 1976 Order and the amount of money that will have to be expended to carry out the same are both unknown, as is confirmed by the Board's finding of fact in its July 30, 1976 Adjudication, Finding of Facts No. 73, 76 and 78. However, the petitioner genuinely believes that both the time and money involved will be substantial.

17. It is believed that the unknown cost of alleviating the alleged polluting condition might reasonably be expected to be substantial and burdensome not only because of Finding of Fact No. 74(b) of the Board's Adjudication to the effect that alleged pollutant also underlies property owned or occupied by other persons or entities who are not parties to these proceedings and whose identities have not been disclosed in these proceedings, but also, by Findings of Fact Nos. 3 and 4 and Footnote 13, which establish that the polluting condition here sought to be remedied was created, in a regular, ongoing industrial process over several years, as well as documentation of the actual cost spent by the EPA to begin a partial eradication of said problem.

18. The Board also found that the participation of such unknown other landowners and occupiers not parties to the proceedings is needed to complete a drilling, testing, sampling and removal program. (Finding of Fact No. 79)

19. In fact, the Board found that it is impossible to assess the cost of the removal program until further drilling, testing and sampling is completed. (Finding of Fact No. 78)

20. This court, by its Order of May 24, 1978 has eliminated from these proceedings Shell Oil Company and Philadelphia Chewing Gum, two landowners or occupiers who the Board indicated were required to participate in the clean up proceeds.

21. It is averred that the constitutional issues raised by petitioner National Wood Preservers, Inc. in its petition for leave to appeal to the Supreme Court are substantial and are matters of grave and fundamental public importance.

22. It is averred that your petitioner National Wood Preservers, Inc. did not create the polluting condition in question, did not contribute to the polluting condition in question and has only been found responsible by this court to bear the expense of removing same by reason of the court's finding that it had "adopted" the condition in question.

23. It is averred that at the time that these proceedings were initially commenced by the respondent, Department of Environmental Resources in 1973, it had agreed to a supersedeas for the purpose of the proceedings then pending before the Board.

24. In light of the unchanged nature of the polluting condition, which has existed in its present state for over 22 years, it is believed that a continuation of the supersedeas entered by this court will not harm the interest of the Commonwealth of Pennslyvania and pose no threat to human, animal or fish life more substantial than has existed for the last 22 years.

25. On the other hand, it the supersedeas is not continued it will cause grave and irreparable harm to petitioner National Wood Preservers, Inc. in that it may be required to expend substantial unknown amounts of money to eradicate a condition:

a. not created or contributed to by it;

b. which cannot be eradicated without the co-operation of other landowners or occupiers, at least two of whom have been eliminated from the proceedings.

27. The petitioner further represents that: a. unless supersedeas is granted, they will suffer irreparable harm in being obligated and compelled to spend substantial unknown amounts of time and sums of money (which sums petitioner believes and therefore avers would not be recoverable by them from any party in the event they were to prevail in this appeal) to undertake a pollution removal program before they have had their opportunity to be heard by the Supreme Court on the questions or law to be presented;

b. this petition is not interposed merely for purposes of delay, but to the contrary the petitioner genuinely believes that the questions of law presented in its Petition for Leave to Appeal to the Pennsylvania Supreme Court are bona fide and justifiable and petitioner has every reasonable expectation, upon appeal, of prevailing in this matter upon the merits.

28. It is averred that if the petitioner were compelled to comply with the Board's July 30, 1976 Order while its appeals are pending, such appeals would be rendered moot and the petitioner would effectively be deprived of its constitutional right of appeal.

29. The grant of supersedeas will cause no injury to the public or to the waters of the Commonwealth in that the alleged polluting condition is not of recent origin, but to the contrary, has existed unchanged for 22 years and there is no fact relevant in this case which could give rise to an inference that the supersedeas here requested could, if granted, would result in any such worsening or aggravation of the condition as could work an injury to the public.

WHEREFORE, petitioner request that this Honorable Court continue the supersedeas previously entered in that matter on October 15, 1976.

FELL, SPALDING, GOFF & RUBIN

By

STEPHEN R. BOLDEN

1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106
(215) 925-8300

EXHIBIT E

ENVIRONMENTAL PROTECTION AGENCY
Region III
Surveillance & Analysis Division
6th & Walnut Streets
Philadelphia, Pa. 19106
Oct 28 1976
Mr. Donald S. Goldstein
National Wood Preservers, Inc.
Eagle Road & Pennsylvania R.R.
Havertown, Delaware Co., Pennsylvania 19083

Dear Mr. Goldstein:

This notice meets the requirements of the National Oil and Hazardous Substances Pollution Contingency Plan, Annex VIII, 1803 (40 CFR 1510).

This office has reason to believe that your facility is the source of a discharge of oil into Naylor's Run in violation of Section 311(b)(3) of the Federal Waters Pollution Control Act ("The Act") as amended in 1972 (33 U.S.C. 1321(b)(3)). As operator of such facility, you are advised that the Federal Government encourages dischargers to take proper and appropriate actions to remove the pollutant from the water and shoreline and take all measures necessary to abate said discharge.

You are further advised that any response action taken will be monitored by the U.S. Environmental Protection Agency. If after this advice you do not initiate proper removal and/or abatement action, the U.S. Environmental Protection Agency will, pursuant to Section 311(c)(1) of the Act, take necessary action to remove the pollutant and abate the discharge.

In this eventuality, stand advised that within the judgements of Section 311(f) of the Act, you will be liable to the U.S. Government for all costs, including Government personnel time, incurred in this response action. If you fail to notify this office of your intentions by Monday, November 1, 1976, this office is prepared to

commence abatement actions, including, but not limited to well drilling, sampling, and geological surveys. If you do perform the response function, you should note two restrictions. The application of chemical collecting agents to oil or floating hazardous substances may not be used unless authorized by the undersigned. Sinking Agents are expressly prohibited.

Sincerely yours,
Howard J. Lamp'l
Federal On-Scene Coordinator
cc: Dennis Coyne, Esquire
Stephen R. Bolden, Esquire
Received _____
3SA30/NWISE/rt: 27 October 1976

EXHIBIT F

WU INFOMASTER
EPAOHM PHA
025869A303 1447EST
MA 1 PHILADELPHIA PA OCT
TLX 892427 COASTGUARD WSH

NOTE: CCGDTHREE PSE PASS MSG TO COTP COAST GUARD GLOUCESTER NJ

POLREP 12 — OIL SPILL — NATIONAL WOOD PRESERVERS, NAYLOR'S RUN, HAVERFORD, DELAWARE COUNTY, PA. FEDERAL PROJECT NO. 1-6-0104 CASE NO. PA-76-447

1. SITUATION
   A. OSC BRIEFED COMDR. MULLEN (MEP) ON OCTOBER 27 CONCERNING LONG TERM FEDERAL REMOVAL ACTIVITY INVOLVING DRILLING AND WELL PRODUCTION REQUIRED TO REMOVE SOURCE OF OIL. TOTAL COSTS RANGE FROM $50,000 TO $200,000.
   B. 3RD CG DIST. CONTRACTING OFFICER DISCUSSED WITH OSC AND CONTRACTOR ON OCT. 29 ON DETAILS FOR CONTRACTING

COSTS INCLUDING COORDINATING OF ULTIMATE DISPOSAL OF RECOVERED OIL.

C. HAVERFORD TWP. ENGR. CONTACTED. HE WILL ASSIST OSC IN NOTIFYING PROPERTY OWNERS AND UTILITY COMPANIES OF WELL AND/OR SUMP HOLE OPERATIONS.

D. LTR. OF SUSPECTED DISCHARGES SENT TO NATIONAL WOOD PRESERVERS AND OWNER OF LEASED PROPERTY (CLIFFORD AND VIRGINIA ROGERS) IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.

E. USF&WS CONTACTED BY OSC KEN CHITWOOD, REFUGE MGR., TINICUM ENVIRONMENTAL CENTER WILL TAKE SOME SAMPLES TO COMPLEMENT OTHER SAMPLES IN TINICUM NATURAL WILDLIFE REFUGE. (NOTE DISCHARGE OF OIL IN HAVERFORD FLOWS INTO TINICUM MARSH WHICH IS REPORTED TO BE LAST FRESH WATER TIDAL MARSH IN PENNA.)

F. PA. STRIKE FORCE ATTORNEY BRIEFED OSC ON STATE'S UNSUCCESSFUL EFFORTS TO REQUIRE IMMEDIATE REMEDIAL ACTION OF POLLUTORS.

2. FUTURE PLANS
REQUEST ADDITIONAL $10,000 TO COVER STREAM CLEANUP AND ANTICIPATED DRILLING OPERATIONS TO COMMENCE 0800 HRS. MONDAY, NOVEMBER 1, 1976. STRATEGY PLANNING OF EPA'S ENVIRONMENTAL EMERGENCY RESPONSE UNIT (EERU) MOBILE TRAILER TO BE MADE ON MONDAY AS TO PROPER USE OF THIS EQUIPMENT.

3. CASE PENDS.

EXHIBIT G

MA 1 PHILADELPHIA PA NOV 2
TLX 892427 COASTGUARD WSH

NOTE; CCGDTHREE PSF, PASS MSG TO COTP COAST GUARD GLOUCESTER NJ

POLREP 13 - OIL SPILL - NATIONAL WOOD PRESERVERS, NAYLOR'S RUN, HAVERFORD, DELAWARE COUNTY, PA. FEDERAL PROJECT NO. 1-6-0104 CASE NO. PA-76-447

1. SITUATION
   THREE WELLS DRILLED TO 30 FEET (8 IN. I.D.) ON PROPERTY OF NATIONAL WOOD PRESERVERS. THREE EXPLORATORY HOLES MADE ON PRIVATE PROPERTY DOWNHILL FROM PHILADELPHIA GUM PROPERTY. INTERCEPTOR TRENCH DUG AT DOWNSTREAM LOWER DISCHARGE. OIL IS NOTICEABLE IN WELLS AND TRENCH. CONTRACTOR HAS L010 MEN AND EQUIPMENT ON SITE. COST ESTIMATE FOR NOVEMBER 1 AND 2 APPROX. $5,700. TANK TRUCK ON SCENE TO REMOVE OIL FROM WELLS. PRODUCTION TO START WEDNESDAY, NOVEMBER 3.
2. ACTION TAKEN
   EPA GEOLOGIST AT SITE. EDISON LAB (EPA) WILL EERU PERSONNEL MET OSC TO DISCUSS USE OF MOBILE TRAILOR. PILOT TEST INDICATES THAT THIS UNIT CAN REMOVE OIL AND PCP FROM DECAUTED OIL/WATER FROM WELL PRODUCTION. OSC AND REGIONAL ADM. MET PRESS AT SITE. TWP. MGR. AND ENGR. AT SITE.
3. FUTURE PLANS
   CONTRACT WITH ROLLINS PERLE TO BE COORDINATED BY CONTRACTING SECTION OF 3RD CG DISTRICT. TEST PUMPING OF WELLS TO DETERMINE IF EERU UNIT IS FEASIBLE.
4. CASE PENDS.

EXHIBIT H

HOWARD J. LAMP'L
EPA-REGION III
7106700716
2 PHILADELPHIA PA OCT 2
TWX 7108229269 EPA SPILLS WSH
3 PHILADELPHIA PA NOV 2
TLX 126831 COASTGUARD NYK

MA 1 PHILADELPHIA PA JAN 7
TLX 126831 COASTGUARD NYK

NOTE: CCGDTHREE PSE PASS MSG TO COTP COAST GUARD GLOUCESTER NJ

POLREP 22 - OIL SPILL - NATIONAL WOOD PRESERVERS, NAYLOR'S RUN, HAVERFORD, DELAWARE COUNTY, PA. FEDERAL PROJECT NO. 1-6-0104 CASE NO. PA-76-447

1. SITUATION
   OIL DISCHARGE INTO NAYLORS RUN CONTINUING AT UPPER DISCHARGE. OIL CONTAINED IN TRENCH AT LOWER DISCHARGE.

COST BREAKDOWN TO DATE;

UNDERWATER	
TECH	118,300
EERU	40,000
ROLLINS	1,500
EPA	5,000 EST.
	164,800

REQUEST ADDITIONAL 15,000 TO COVER COST THRU JAN 15. CEILING TOTAL 170,000

2. ACTION TAKEN
   FILTER FENCES IN NAYLORS RUN IN PLACE AND MAINTAINED ON AN EVERY OTHER DAY BASIS. TRENCH AT LOWER DISCHARGE INTERMITTENTLY CLEANED OF ACCUMULATED OIL. REGIONAL RESPONSE TEAM MEMBERS FROM THE CORP OF ENGRS. MET WITH OSC TO ADVISE ON TRENCH EXCAVATION AND CONSTRUCTION METHODS AT LOCATION OF PREVIOUS CAVEIN OF UNCONSOLIDATED FULL.
3. FUTURE PLANS
   CONTRACTOR TO OBTAIN MATERIALS AND EQUIPMENT TO CONSTRUCT STABLE TRENCH FOR COLLECTION AND REMOVAL OF OIL AT UPPER TRENCH LOCATION. CORPS OF ENGRS. TO REVIEW FINAL OPERATION BEFORE EXCAVATION.
4. CASE PENDS.

EXHIBIT I

HOWARD J. LAMP'L
EPA-REGION III
7106700716
2 PHILADELPHIA PA JAN 7
TWX 7106708880 USA ENGR PHIL
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106
June 2, 1977 CERTIFIED NO. 761841

Commander (mep)
Third Coast Guard District
Governor's Island
New York, New York 10004
Gentlemen:

Enclosed is the interim On-Scene-Coordinator's (OSC) report concerning the waste oil discharge into Naylors Run, Haverford Township, Delaware County, Pennsylvania, Federal Project No. 1-6-0104.

The contractors accounting of the money used under this project number is being transmitted to the contracting office as the work is being conducted. To date, approximately $180,000 has been spent on this cleanup.

In view of the number of parties involved and the resulting legal complexities, it is recommended that a meeting be held in Philadelphia. This would afford Coast Guard officials an opportunity to view the sites, meet with State officials, and formulate a coordinated enforcement strategy.

Sincerely yours,
Howard J. Lamp'l, *Chief*
Environmental Emergency Branch
Enclosure

STATE OF PENNSYLVANIA :

SS:

COUNTY OF PHILADELPHIA :

Alan M. Goldstein, Vice President of National Wood Preservers, Inc., being duly sworn according to law, deposes and says that he is the petitioner herein named, and that the facts set forth in the foregoing Petition are

true and correct to the best of his information, knowledge and belief.

SWORN to and SUBSCRIBED:
before me this 20th day:
of June, 1978

Notary Public

CERTIFICATION OF SERVICE

I hereby certify that I am hereby this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121.

Service by Hand Delivery
Addressed as Follows:
Commonwealth Court of Pennsylvania
Office of the Prothonotary
City Hall
Philadelphia, PA 19107
Service by First Class Mail

Addressed as Follows:
J. Stoke Adams, III, Esquire
2000 Two Penn Center Plaza
Philadelphia, PA 19102
Leonard Dubin, Esquire
1100 Four Penn Center Plaza
Philadelphia, PA 19103

James S. Kilpatrick, Jr., Esquire
15 Rittenhouse Place
Ardmore, PA 19003

William Mowatt, Esquire
Courthouse Square West
229 North Olive Street
Media, PA 19063

Dennis M. Coyne, Esquire
Assistant Attorney General
Dept. of Environmental Resources
Bureau of Litigation Enforcement
Suite 1200 - 1315 Walnut Street
Philadelphia, PA 19107
Dated: June 21, 1978

By: _____

STEPHEN R. BOLDEN
Attorney for Petitioner,
National Wood Preservers, Inc.

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-90

In the Supreme Court of the United States

October Term, 1980

NATIONAL WOOD PRESERVERS, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

and

TOWNSHIP OF HAVERFORD,
Intervenor

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

No. 80-90

NATIONAL WOOD PRESERVERS, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

and

TOWNSHIP OF HAVERFORD,
Intervenor

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

Appellee and Intervenor move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania without further argument on the ground that this appeal presents no substantial federal questions.

COUNTER-STATEMENT OF QUESTION INVOLVED

Is it an unconstitutional exercise of the police power for a State to enact legislation which requires a business enterprise to undertake feasible water pollution control measures to abate a toxic water pollution condition which originates on its premises and which was caused by the enterprise itself?

COUNTER-STATEMENT OF THE CASE

The Pollution Condition

This appeal involves a water pollution condition on the premises of National Wood Preservers, Inc. ("National Wood") located in Haverford Township, Delaware County, Pennsylvania.

National Wood caused the pollution condition by dumping industrial wastes from its wood preservative business into the groundwater via a well. Adjudication of the Environmental Hearing Board ("EHB"), Joint Appendix to Jurisdictional Statement ("A")-53. Specifically, National Wood dumped pentachlorophenol ("PCP") and fuel oil into the well. EHB, A-53, A-60; Opinion of Commonwealth Court ("Commonwealth Ct."), A-29-A-39, A-41; Opinion of the Pennsylvania Supreme Court ("Pa. Supreme Ct."), A-3-A-4. PCP is an acidic, highly toxic chemical which is used in the wood preservative business to treat wood. EHB, A-53, A-71; Commonwealth Ct., A-29-A-30; Pa. Supreme Ct., A-3.

The PCP and fuel oil mixture dumped into the groundwater by National Wood contaminates the groundwater under National Wood's premises. EHB, A-70, A-81-A-82; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4. Such contamination constitutes pollution within the meaning of the Clean Streams Law. EHB, A-82; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4. The PCP and fuel oil mixture pooled under National Wood's premises flows under the surface of the land into an underground storm sewer pipe which discharges the contaminant

into a surface stream—Naylor's Run. EHB, A-70; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4.

The Proceeding Below

On July 12, 1973, the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") issued an administrative order under section 316 of the Clean Streams Law, 35 Pa. Stat. Anno. §691.316, to National Wood requiring it to take action to correct the pollution condition on its premises. EHB, A-48.

National Wood filed a timely appeal from DER's order to the EHB—an administrative adjudicatory body independent of DER.[1] EHB, A-48; Section 1921-A of the Administrative Code of 1929, 71 Pa. Stat. Anno. §510-21. On January 31, 1974, the EHB granted the petition to intervene filed by the Township of Haverford, the municipality in which the pollution condition exists. EHB, A-52.

On July 30, 1976, after hearing, the EHB affirmed DER's order against National Wood without dissent.[2] EHB, A-48-A-90.

On May 24, 1978, the Commonwealth Court, after appeal by National Wood, affirmed the order against National Wood without dissent. Commonwealth Ct., A-25-A-47.

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[1] When used in the context of a citation to the Joint Appendix, "EHB" refers to the Adjudication of the Environmental Hearing Board; otherwise it refers to the Environmental Hearing Board itself.

[2] The EHB modified DER's order in a few respects, but DER did not appeal from, nor object to, those modifications. When used henceforth in this Motion, "Order" shall refer to the DER order as modified by the EHB.

On April 24, 1980, the Pennsylvania Supreme Court, after appeal by National Wood, affirmed the order against National Wood without dissent.[3] Pa. Supreme Ct., A-1-A-24.

This appeal is from the order of the Pennsylvania Supreme Court.

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[3] Justice Flaherty filed a concurring opinion.

ARGUMENT

This Appeal Presents No Substantial Federal Questions

This is a case wherein DER has issued an administrative order to a business enterprise requiring it to use conventional water pollution control methods to abate a pollution condition which exists on its business premises and which it created in the first place. The EHB, the Commonwealth Court and the Pennsylvania Supreme Court all upheld DER's order without dissent.[4] This case involves nothing more than liability for public nuisance abatement under principles of Pennsylvania law and presents no substantial Federal questions.

The order which is the subject of this appeal was issued under the Clean Streams Law. The Clean Streams Law is the basic water pollution control statute in Pennsylvania. Section 316 of the Clean Streams Law is an integral part of the comprehensive water pollution control requirements of that statute and authorizes DER to issue administrative orders to landowners and occupiers to correct pollution conditions on their land.[5] Contrary to National Wood's misrepresentations in its Jurisdictional Statement (see Jurisdictional Statement at 26), Section 316 only authorizes the mildest form of civil remedy in the Clean Streams Law—an administrative order—and has nothing to do with criminal remedies. Indeed, Section 316 merely embodies the principle of Pennsylvania law that an owner or possessor of land is liable for a nuisance condi-

[4] See footnote 3, *supra*.

[5] Section 316 is quoted in relevant part at A-2.

tion on his own property. See *Fitzpatrick v. Penfield,* 267 Pa. 564, 109 A. 653 (1920); *Barker v. Brown,* 236 Pa. Superior Ct. 75, 340 A.2d 566 (1975); *Boyer v. Arianna,* 94 Pitts. L.J. 21 (1945).

In sharp contract to National Wood's wildly exaggerated and spurious arguments, this case illustrates the reasonableness of Pennsylvania's regulatory scheme under any test.

First, there is no question in this case that a serious pollution problem exists. The pollution condition consists of a mixture of PCP and fuel oil which contaminates the groundwater under National Wood's premises. EHB, A-70, A-82; Commonwealth Ct., A-28; Pa. Supreme Ct., A-4. PCP is an acidic, highly toxic chemical which is used in the wood preservative business to treat wood. EHB, A-53, A-71; Commonwealth Ct., A-29-A-30; Pa. Supreme Ct., A-3. Groundwater contamination constitutes pollution within the meaning of the Clean Streams Law. EHB, A-82; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4. The PCP and fuel oil mixture pooled under National Wood's premises also pollutes the surface water by flowing under the surface of the land and intercepting an underground storm sewer pipe which discharges it into Naylor's Run. EHB, A-70; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4.

Moreover, National Wood has always been intimately associated with the creation and maintenance of the pollution condition. National Wood has at all relevant times possessed the property under leasehold and conducted its wood preservative business on it. EHB, A-52-A-53; Commonwealth Ct., A-27; Pa. Supreme Ct., A-3. In fact, in the course of its operation, National Wood itself caused the pollution problem by dumping PCP and fuel oil into

the groundwater via a well.[6] EHB, A-53, A-60; Commonwealth Ct., A-29-A-30, A-41; Pa. Supreme Ct., A-3.

National Wood's attempt to argue in its Jurisdictional Statement—relying primarily on unsupported allegations—that the order is unlimited is contrary to the record and without merit. The method of abatement required by the order—using wells to test for and pump the polluting product from the top of the groundwater—is commonly accepted and widely used. The EHB specifically found that the requirements of the order are feasible. EHB, A-86; see Pa. Supreme Ct., A-4.[7] In addition, the water pollution control methods which the order requires National Wood

---

[6] In its Jurisdictional Statement, National Wood attempts to argue that its present management is not associated with the nuisance condition. This argument is both irrelevant and false. In the first place, as stated above, National Wood continues to possess and utilize the property for its wood preservative business. In any event, the order was directed at National Wood Preservers, Inc., not at individuals. Even assuming *arguendo* that the association of National Wood's present management with the nuisance condition is relevant, the findings below are conclusive that the present management not only took over National Wood with knowledge of the pollution condition but also engaged in "affirmative conduct which indicates an adoption of the condition". Commonwealth Ct., A-42. The present management even went so far as to explicitly release the prior management from a warranty that no liability for pollution existed. Commonwealth Ct., A-41-A-42.

[7] This finding dispositively contradicts National Wood's unsupported allegations in its Jurisdictional Statement that the order is unlimited. In order to clear the record, however, we will set forth several additional points regarding the economic cost portion of National Wood's feasibility argument.

In the first place, National Wood is precluded from making these arguments here because it did not raise them below. The

(Footnote continued on following page.)

to undertake are specifically limited to actions on its own business premises.[8] EHB, A-83. Furthermore, to resolve any disputes which may arise with regard to the order, the EHB—an adjudicatory body independent of DER—has retained jurisdiction in the case. EHB, A-90.

(Footnote continued from preceding page.)
Pennsylvania Supreme Court specifically found that National Wood did not argue that the requirements in question were "unduly oppressive" because of economic impact or interference with the use of their property. Pa. Supreme Ct., A-16.

Even if no dispositive findings regarding feasibility and failure to raise issues had been made below, National Wood's economic cost arguments consist of unsupported and misleading allegations. One example of this type of representation—unaccompanied by any attempt at record citation—is National Wood's allegation at page 9 of its Jurisdictional Statement that it already has expended some funds to abate the pollution problem. To the contrary, any such effort was related to a criminal case involving pollution caused by National Wood and is not involved in this case. Further, National Wood refers to an alleged expenditure by the Federal government on the pollution problem—also unaccompanied by any attempt at record citation. In fact, that expenditure was for several different kinds of pollution abatement work including stream filtration, trench construction and other recovery activities on several different properties, is outside the scope of the order in this case and does not accurately reflect the cost of abatement in this case.

[8] The fact that the order only requires National Wood to abate the pollution problem on its own premises disposes of National Wood's equal protection argument. As a point of information concerning National Wood's equal protection argument, we note that the Pennsylvania Supreme Court in its consolidated opinion below dismissed several abatement orders against other parties not involved in this appeal on technical grounds relating to the time for filing Petitions and Cross Petitions for Allowance of Appeal under the Pennsylvania Rules of Appellate Procedure. None of these dismissed orders required pollution abatement on National Wood's premises and they are not relevant here.

CONCLUSION

For the foregoing reasons, Appellee and Intervenor move that this appeal be dismissed or, in the alternative, that the opinion of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted

K. W. JAMES ROCHOW
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Supreme Court, U. S.
FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

No. 80-90

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NATIONAL WOOD PRESERVERS, INC., *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

and

TOWNSHIP OF HAVERFORD, *Intervenor*

ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF APPELLANT NATIONAL WOOD PRESERVERS, INC., IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

STEPHEN R. BOLDEN, ESQUIRE
MICHAEL S. LUBLINE, ESQUIRE
ALEXANDER N. RUBIN, JR., ESQUIRE*
Counsel for Appellant, National Wood Preservers, Inc.

FELL, SPALDING, GOFF & RUBIN
1800 Penn Mutual Tower
510 Walnut Street
Phila., PA 19106
(215) 925-8300

**Counsel of Record*

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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No. 80-90

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

NATIONAL WOOD PRESERVERS, INC., *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

and

TOWNSHIP OF HAVERFORD, *Intervenor*

ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF APPELLANT NATIONAL WOOD PRESERVERS, INC., IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

This Appeal Presents Substantial Federal Questions

Appellant, National Wood Preservers, Inc. ("Wood") believes that it has properly stated the facts of this case in its jurisdictional statement, and properly presented to this Court substantial federal questions which we believe deserve consideration by this Court. Rule 16.1(b) of the Rules of the Supreme Court of the United States per-

mits "a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis."

The Commonwealth Court apparently believed there is a substantial federal question here, since it went to great lengths (impermissibly in the view of Appellant, Wood) to "constitutionalize" Section 316 by reading into it certain requirements of fault, and straining to allocate such fault to Appellants. The Supreme Court of Pennsylvania also explicitly acknowledged the existence of a substantial federal question, and indeed, stated very clearly in its opinion that it would not entertain the issue of fault; that not being a prerequisite of the statutory provision which it construed and held to be constitutional.

The Motion of Appellee, D.E.R. appears to argue that the judgment rests on an adequate non-federal basis, thereby ignoring the fact that it is the Opinion of the Supreme Court of Pennsylvania which is appealed from and not that of the Commonwealth Court.

The Motion does not offer a single authority to support the proposition that the constitutionality of Section 316 does not present a substantial federal question, but instead seeks to prove, by reference to the record taken out of context, that Appellant, Wood, "has always been intimately associated with the creation and maintenance of the pollution condition."

At issue is Section 316 of the Clean Streams Law, which does not require fault. This case is, in fact, a test case to establish the validity of this particular statute, and not some other statute available to the D.E.R. If it wishes to pursue persons who possess the requisite degree of culpability.[1] D.E.R. has stipulated (see footnote 5

---

1. See, i.e., 35 P.S. §691.307 prohibiting the unauthorized discharge of industrial wastes.

to Opinion of Pennsylvania Supreme Court at A-5) that it was proceeding against Wood, Gum, Shell and Rodgers solely under Section 316.[2] In light of this stipulation, and in light of earlier pursuit of Gum and Shell by D.E.R. — parties who were in no way responsible for *causing* the polluting condition — it is the height of sophistry for D.E.R. to submit to this Court the "counter-statement of question involved" as set forth in its Motion. D.E.R. does not now admit that Shell and Gum should not be subject to Section 316 because they are without fault, but only that their Appeals were dismissed by the Court below "on technical grounds relating to the time for filing Petitions and Cross Petitions for Allowance of Appeal under the Pennsylvania Rules of Appellate Procedure". And further, it is a certainty that if this Appeal is dismissed for lack of a substantial federal question, that the D.E.R. will not hesitate for an instant to rely on the Pennsylvania Supreme Court's pronouncements regarding the lack of culpability required by the statute.

The Factual Allegations

Rather than attempting to set forth arguments supporting one of the permissible grounds for its Motion, the D.E.R. has chosen to confuse the facts, and to show that Appellants are at fault — an issue which is clearly irrelevant here since the Supreme Court of Pennsylvania refused to consider or pass on these points. Nonetheless, we feel duty bound to clarify for the Court those factual points to which we take the greatest exception.

---

2. On November 20, 1974, Dennis M. Coyne, Esquire, Trial Counsel for D.E.R., read the following stipulation into the record:

"The third stipulation is the Commonwealth has stipulated that the aforesaid Orders are based on Section 316 of the Clean Streams Law rather than on an affirmative act of discharging." (R-1879 — reproduced record in this matter.)

Issue of Corporate Succession

The D.E.R. Motion states that "National Wood itself caused the pollution problem". In footnote 3 to Appellant, Wood's jurisdictional statement (also see Stipulation Between Counsel For All Parties, R. 136, 137), it might not have been clearly stated that there exist *two* separate corporations which, at different times, bore the name "National Wood Preservers, Inc.". Where there is a complete change of ownership of a corporation, followed by a liquidation-reincorporation transaction, it is not clear under applicable state law whether the new National Wood Preservers, Inc. (operated by the Goldsteins) is automatically responsible for the past acts of the predecessor corporation (operated by Jacoby). This has neither been raised by Appellee, D.E.R., nor been determined in the Courts below, in this case, and since this question is not easily answered, it is, we suspect, the reason the Commonwealth Court conceived its "adoption theory" of liability. Whether Appellant (new National Wood) is an *actual* polluter because of the illegal acts of Jacoby when he owned the old National Wood has never been decided. Furthermore, unlike any contamination which was related to the operation of the old National Wood Preservers machinery, there is a question of whether the illegal acts of Jacoby in dumping toxic substances down a well could be attributable to his corporation when safe alternative means of disposal were available. Thus, D.E.R.'s representation of "fact" is merely an unsupported conclusion of law.

The Pollution Condition

The D.E.R. argument takes various factual twists and turns when it refers to the "pollution condition". In the context of D.E.R.'s fault argument, the pollution condition is a single condition, confined to Appellant, Wood's property, allegedly caused by National Wood dumping PCP into the groundwater. In the context of its comments regarding "unsupported allegations" that Appellant has already expended certain funds to abate the

"pollution problem", D.E.R. makes an oblique reference to a "criminal case involving pollution caused by National Wood," somehow implying (incorrectly) that National Wood, under the Goldsteins, has been convicted of an offense not disclosed in our previous Statement of Facts.

In footnote 6 to the D.E.R. Motion to Dismiss (at page 8 therein), it is implied that Appellant is still affirmatively maintaining the pollution condition because it continues to utilize "the property for its wood preserving business."

It should be reiterated that the Environmental Hearing Board found as a fact that the present Appellant, Wood, under the operation of the Goldstein family " . . . has not discharged or permitted the discharge of industrial waste into the waters of the Commonwealth" (see Adjudication of Environmental Hearing Board, dated July 31, 1976, Finding of Fact #5, A-53).

It should also be noted that the site of Jacoby's dumping activity, a certain well, is no longer under the possession or control of Appellant, Wood, this portion of the premises having been ceded back to the owner, Rodgers, for lease to Shell. The divestiture of the dumping site by Wood occurred in 1967, three years prior to the enactment of Section 316. (R-865a; see also Adjudication of EHB, July 30, 1976, Finding of Fact #7, R-143a).

The Commonwealth Court, in advancing its "adoption theory" conceptually charged National Wood under the Goldsteins with accepting responsibility for the "pollution problem" because of the $35,000 reduction in purchase price obtained in its settlement with Jacoby.

We believe that the record indicates that the pollution problems caused by Jacoby had two major facets, only one of which was fully disclosed to the Goldsteins prior to their settlement with Jacoby. First, there was the generally dirty nature of the plant and equipment itself. It was the cost of voluntarily abating this condition, that the Goldsteins addressed themselves to in their settlement, since at that time, they had no knowledge of the

true extent of Jacoby's prior dumping activities, nor of any requirement that future legislation would hold them responsible for Jacoby's past acts. It is patently unfair to hold them responsible for Jacoby's past acts involving the then unknown consequences of his dumping.

The contamination and pollution problem which currently exists is not confined to Wood's leased property and is not connected with any present activity of Wood. The pollution exists in the groundwaters under many properties which are continually being re-contaminated by the ebb and flow of groundwaters under the land. If Appellant is forced to pump out the groundwaters under its land, without a coordinated effort by surrounding landowners, it will be forced to draw additional pollutant under its own premises, and thereby to clean up pollutant under the land of others. This situation is brought about by D.E.R.'s failure to include certain landowners as the subject of its orders, and its failure to follow Pennsylvania's Rules of Appellate Procedure with respect to others.

Conclusion

For all of the foregoing reasons, Appellant, Wood respectfully requests that the Motion to Dismiss or Affirm by the Commonwealth of Pennsylvania Department of Environmental Resources be denied.

FELL, SPALDING, GOFF & RUBIN

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